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JUDGE AND JURY

GREEN

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LEON GREEN

GREEN J.& J.

FOREWORD

THE essays here brought together have been written at intervals during the past two years. They represent efforts to develop an understanding of that incomprehensible mass of cases which make up tort "law"—incomprehensible because such cases themselves as articulated through opinions are but fragments thrown off by the judicial process without order save that given them by a classifier. If there can be said to be any method of attack common to the group, it is doubtless due to certain unstated assumptions which have been made. Whether such assumptions can be adequately stated is problematic. The introductory essay dealing with the structure of tort classification has been written for that purpose, though the hazard is a great one that it may prove as confusing as most introductory explanations. Incidentally, it should be said that, written as these essays were, there will sometimes appear minor contradictions, incomplete expressions of an idea, repetitions of the same thought, and other defects which should not be found in a closely knit book.

The theme running through the group is a pragmatic sort of evaluation of the machinery employed by the judicial process in handling litigations in the tort field, with special emphasis upon the part such machinery plays in al-

locating to judge and jury their respective functions. The tangle of theories, doctrines, formulas, and rules employed in these cases must be viewed in perspective and in relation to the judicial process in its entirety in order that government in its efforts to deal with the everyday affairs of a complex society may be rationally conceived. In no other way can the part played by the threadbare phrases so often treated as sanctified principles of a great science be assessed. It is so easy to unduly emphasize the little ways of the courthouse and to look upon the mere currency of its thought as something profound, that the larger significance of courthouse government is obscured. The attempt is made in these essays to shift emphasis from law in its minor rôle of dialectic to law as administration, and especially administration through courts.

I am greatly indebted to the following publications, in which one or more of the essays were published, for permitting me to reproduce them in this form: American Bar Association Journal, American Mercury, Columbia Law Review, University of Pennsylvania Law Review, Virginia Law Review, West Virginia Law Quarterly, Yale Law Journal.

LEON GREEN.

CHICAGO, ILLINOIS,
November 1, 1930.

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JUDGE AND JURY

CHAPTER 1

STRUCTURE OF TORT CLASSIFICATION

In seeking to develop a method of classification sufficiently comprehensive to make understandable the processes government employs in attempting to adjust the everyday affairs which we label torts, the following preliminary observations are of the highest importance:

(1) These affairs involve the greatest variety and complexity of conduct.

(2) The machinery employed in handling them is tremendous in its bulk.

(3) The factors which control the employment of such machinery are multiple in number, subject to numerous shadings and change in their alignment with change in time and place.

(4) The possible combinations of (1) affairs, (2) machinery employed in their handling, and (3) factors which dictate their disposition, are infinite, and thus afford the basis for an indefinite number of tort cases.

These assumptions are frequently either overlooked or ignored, and the problems of government involved in tort cases are approached as though they were soluble by a sort

of automatic manipulation of word mechanisms. No good would be served in elaborating points (1) and (4). Suffice it to say that tort cases represent by far the largest body of litigation, and the broadest terms are required for their structural classification.

The machinery required for handling tort cases is intricate both in court organization and intellectual concepts. Court organization, as made up of judge, jury, parties, attorneys, witnesses, and the numerous facilities which these must have, is at a maximum in these cases. And the abuses of the numerous processes themselves, which are at the command of the various agencies employed in this and other fields, in turn become tort cases for disposition by the same machinery. But it is only the operations of two of these instrumentalities, viz., judge and jury, which can be emphasized here. The machinery required in order for this dual judgment-passing device to function at all is enormous. It is because of the many difficulties here encountered, which ramify into so many directions throughout the judicial process, that the essays brought together in this book are published under the title, "Judge and Jury."

INTELLECTUAL MACHINERY

The intellectual machinery employed in handling tort cases has not been, nor doubtless can it be, scientifically laid out. It has grown up, as our language has grown, word by word, phrase by phrase, to fit a particular case, as well as a particular taste, each word and each phrase becoming a starting point for numberless shadings and com-

binations with other words and phrases as a wide range of judicial taste should dictate. Given the peculiar sanctity accorded terms judicially spoken, the language of the law becomes imposed upon terms of general usage in such a way that only the most skilled and wary, if any, can escape its entrapments. The problem of language is the severest test that legal science faces. The judgments which men pass in courts and elsewhere are generally far beyond any power they have for expressing them nicely and acceptably.

No structural classificatory terms for tort cases have yet been widely accepted. The judges, practitioners, and scholars have been too busy handling the cases which pressed for immediate disposition and explanation, to take time for structural work. Thus, classificatory structure has been largely ignored. Such an undertaking is attempted here.

The synthesis suggested is: Persons have *interests* which are subjected to *harms,* against which the *judicial process* gives *protection.*[1] The major terms of this synthesis are the subjects of analysis and description.

Interests are analyzed as follows:

1. Personality—Integrity of the Person.

2. Property—(1) Physical Integrity. (2) Use and Enjoyment.

3. Relations with Others—(1) Family Relations. (2)

[1] This synthesis and the following analysis are employed as the basis of classification for the writer's casebook, "The Judicial Process in Tort Cases."

Social Relations. (3) Professional Relations. (4) Political Relations. (5) Trade Relations.

Harms are analyzed as follows:

1. Physical.
2. Appropriation.
3. Defamation.

The *Judicial Process* [2] is analyzed as follows:

1. Judge.
2. Jury.
3. Theories, Doctrines, Formulas, Rules, etc.
4. Review.

Protection is analyzed as follows:

1. Compensation.
2. Prevention.
3. Punishment.
4. Insurance.

INTERESTS

The term *interest* is taken from the everyday vocabulary and put to an important use in this classification. In so far as definition is desired, that of Dean Pound is acceptable: "I should define an interest for the present purpose as a claim or want or desire of a human being or group of human beings which the human being or group of human

[2] This section of the analysis is partial. It does not take into consideration parties, attorneys, witnesses, pleading, evidence, and the minutiæ of court administration.

beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilized society must take account." [3] The three classes of interests suggested are expansible and would seem to cover all the wants and desires of persons. Of these, the *interest of personality* is probably the most important in cases described as torts.

Dean Pound and others have considered the *interest of personality* as multiple, normally (1) the physical person, (2) honor, reputation, and (3) belief and opinion.[4] In this classification, personality is conceived to be a unity. It is readily conceded that "the person" is something more than the mere body; he is a going concern with blood and bones, nerves, intellect, spirit, life itself. This being so, it is felt that the "integrity of the person" comprehends the whole being. It is true that this "person" demands honor, reputation, and has opinions and beliefs. But these call for the introduction of third persons into the picture. It is thus felt that honor and reputation can most significantly be identified with the *interests in relations with others*. It is the honor and repute that others give, about which there is so much concern. He who would cause others to withhold honor and good repute may hurt vitally, but he is striking a different interest from that of the personality. Likewise, it is the privilege of expressing beliefs and opinions to third persons which is regarded so highly. These points are therefore identified with the *interests*

[3] Selected Essays on the Law of Torts, p. 86; 28 Harvard Law Review 343, 345, note (1924).

[4] Supra, n. 3.

in relations with others, rather than the *interest of personality.*

It is true that conduct which affects these other relations react on the person. But that is equally true as to interests in property. It is conceded though, that there is a modicum of significance in identifying these points (honor, reputation, belief and opinion) with the interest of personality. An insult, for instance, affects the person even though it be unknown to third persons. One's dignity is offended. Likewise, restriction upon one's belief, even though it is not expressed, or upon the very act of talking or writing, is a serious thing. But in so far as these have significance apart from affecting the relations with third persons, they cannot arise except the integrity of the person itself be jeopardized as by physical force or threat or insulting language, etc. Hence, these latter phases of honor, reputation, belief and opinion are cared for in the cases which involve harms to the personality. Cases constantly arise in which multiple interests are affected by the same harm.

The *interests in property* which are found in tort cases follow in part the interest of personality. They pertain to the "integrity of the thing." But that phrase is not sufficiently inclusive. Thus, the interest in "use and enjoyment" is added. As will be seen later, the *harm of appropriation* has its most important part to play in the cases dealing with property interests. It is clear that the physical integrity of the thing, its use and enjoyment and wrongful possession, are normally so closely related that, as against physical hurts and appropriation, they can probably

best be treated together as "tort" cases, leaving the cases involving the adjustment of the claims of multiple owners and adverse claimants to be dealt with as "property" cases. The alternative suggestion is that all cases involving exclusively the harm of appropriation of "things" be set off as the subject-matter of the "property" field as opposed to the tort field. It is to be noted further that "reputed character and value" of property, as was the case as to "reputation" of the person, is allocated to the *interests in relations with others.*

The broadest class is that of *interests in relations with others.* There are few boundaries to be discovered here. The protection given in such cases is being constantly extended in many directions. Any attempt to indicate the developments which have taken place in recent years with respect to these interests would require too much discussion at this point.

The question arises: "Why classify *interests*? What significance does such a classification give or have?" There is no easy answer. The absence of any counter proposal gives nothing against which to set it off. It is merely a beginning point, and no other one so closely identified with human conduct has been found. Human wants are constantly seeking recognition and protection by society through its governmental agencies. They permit the very simple inquiry: "How is it that this litigant claims to have been hurt? For what does he desire a court's aid?" The litigant's call for help is thus reduced to such a problem that the judicial process can take hold of it and begin to work

with it. Inasmuch as society, through its courts, has actually treated these calls for help differently as they have involved an interest of personal integrity, or the integrity or use and enjoyment of some "thing," or the relation with some other person, the classification on the basis of "interests" is an attempt to recognize what the courts have recognized, and thereby to aid in ascertaining what courts may continue to do.

HARMS

The term *harm* is another everyday expression taken into service here. The term is a comprehensive one, in that it is the total effect upon the interest injured as a result of a defendant's conduct. It is the result of the culmination of a *risk* created by a defendant's conduct. The insurance cases give an analogy. The insured recovers nothing on his policy unless he suffers a loss. The insurer carries the risk of loss from the hazard insured against. In the tort case, the plaintiff gets no protection by way of damages against the risk which a defendant's conduct imposes in absence of harm. But he may get such protection by way of a preventive remedy if there is a threatened harm. Whether the risk of harm may be upon the defendant by virtue of his conduct towards plaintiff is frequently a good way to put a problem. Both plaintiffs and defendants are parties in law suits, however, and a case should be regarded from both points of view before a decision is reached. Inasmuch as this classification begins with plaintiff's interests, it is believed to be more apt to classify the objects

against which protection is given as *harms*, rather than *risks*, though the whole matter depends upon the point of view from which it is considered. There is no vital distinction between protection against harms and protection against risks; the judicial process may afford protection against either.

But the question again arises: "What is the significance of classifying harms? or risks?" And again the question is a difficult one. The answer, if any, seems to lie in the fact that persons are hurt in their various interests, and if these hurts can be so classified as to make the cases easier to handle, then that is a sufficient reason for doing so. The reduction of harms to three general classes, (1) physical harms, (2) harms of appropriation, and (3) harms of defamation, is advantageous in its simplicity if at the same time it is adequate.

Physical harms are clear enough, though sometimes physical is set off against mental or nervous, as though the latter were not dependent upon a physical basis.[5]

[5] In my casebook, I have classified the materials involving Physical Harms to the Interests of Personality and Property as follows:

Part One

Interests of Personality and Property

Chapter I

Physical Harms

§ 1. Threats, Insults, Offensive Contacts, Blows, Attacks, Fights, etc.

§ 2. Restraints and Detentions, etc.

Harms of appropriation may seem somewhat strange. Heretofore, the idea has been recognized by this name, in the "conversion" group of cases alone, and that only partially. There it is impaired somewhat by the insistence from some quarters that the further phrase "to the use and benefit" of the appropriator must be added, but it is not believed that such addition is required. "Appropriation"

§ 3. Surgical Operations; Treatment, Control, etc., of Sick, Disabled and Irresponsible Persons.
§ 4. The Keeping of Animals, etc.
§ 5. The Occupancy, Ownership, Development of Land, etc.
  A. Neighboring and Adjacent Owners, Occupiers, etc.
    (1) Fire.
    (2) Water.
    (3) Various Developments upon and Uses of Adjoining Lands.
    (4) Trees, Noxious Growths, Fences, etc.
  B. Persons Using Ways, Streets, etc.
  C. Persons upon Premises of Others, etc.
  D. Tenants, Members of their Families and Others.
§ 6. Manufacturers, Dealers, etc.
§ 7. Contractors, Builders, Workmen, etc.
§ 8. Power, Telegraph and Telephone, Water and Gas Companies, etc.
§ 9. Cities, Towns, Counties, etc.
§ 10. Traffic and Transportation, etc.
  A. Highway and Railway Collisions.
    (1) In General.
    (2) Crossing Cases.
    (3) Traffic Regulations.
  B. Waterway Traffic.
  C. Passengers.
  D. Freight.

includes the idea of "deprivation" in so far as that idea is useful, and it is very useful in many types of cases. In the "conversion" cases a property interest is involved and the harm is easy to detect. It is believed that the same idea is involved in the hurts to the interest of personality found, for example, in some of the cases involving the so-called "right of privacy," in the taking of another's name, in cases of impersonation, and in cases of involuntary servitude. The familiar case involving the unauthorized use of one's photographic likeness seems to fall much better here than as the invasion of a property interest or as an interference with one's interests in relations with other persons, though of course there are cases where both the last mentioned interests are involved. Also it is believed that this term represents the idea at the basis of those cases involving property interests usually classified under "deceit," piracy, and infringement.[6]

Harm of defamation. The term defamation is already in general use. It is pertinent exclusively to interests in

[6] In my casebook, I have classified the materials involving Appropriation of the Interests of Personality and Property as follows:

Chapter II

Harms of Appropriation

§ 1. Chattels.
§ 2. Timber, Crops, Soil, Minerals, etc.
§ 3. The Acquisition or Deprivation of Credit, Money, Chattels, Land, through False Representations.
§ 4. Personal Services, Photographs, Names.
§ 5. Piracy, Plagiarism, Infringements.

relations with others. It is not sufficient to care for all the harms to those interests. The harms of physical hurt and appropriation are there also. In fact, in the transactions involving relations with others, the harms are usually so interrelated that it is impossible to keep them separate. It is not necessary that they should be kept separate. On the other hand, the complexity is usually so great that the merger of these harms is rather the significant thing than not. So here it is necessary to examine the particular relations, the particular conduct of defendant, and observe the protection given, and await the emerging of more acceptable classificatory terms, if it should be thought necessary to have them. But until that time, it is not in keeping with the notion of this classification to force a terminology in order to complete the scheme. On the other hand, the idea is to furnish only such structural framework as will make the handling of the cases more understandable.[7]

[7] In my casebook, I have classified the materials involving Harms to the Interests in Relations with Others as follows:

Part Two.

Interests in Relations with Others

Chapter I

Harms of Defamation, Appropriation and Physical Impairment

§ 1. Family Relations.

A. Injuries resulting in death.

B. Physical Injuries, Seduction, Alienation, Death Messages, Dead Bodies, etc.

§ 2. Social Relations.

§ 3. Professional Relations.

THE JUDICIAL PROCESS

The judicial process is assumed to be rational. It is under the supervision of a judge. He has the power to direct the process in the particular case. In tort cases he is normally required to employ a jury with which must be shared the power of passing judgment. The allocation of power or the division of functions is not at all easy. Many theories, doctrines, formulas, and rules may be employed in the course of a complex case. Some of these are employed by the judge for his own use either in reaching or articulating a decision on questions which are exclusively for himself; others are employed in translating to the jury the problems on which a jury must pass; still others are used by appellate judges in articulating their own decisions whether by way of guidance for another trial of the same case or generally as a contribution to legal science. These theories, doctrines, formulas and rules, run all the

§ 4. Political Relations.
§ 5. Trade Relations.

No provision in the classification as set forth in notes 5, 6, and 7 has been made for hurts incident to abuses of governmental processes. It is believed that protection against these hurts is treated so differently as to warrant a separate classification. Hence, the writer includes in his selection of cases a classification of such harms as follows:

Part Three

Interests of Personality, Property and Relations with Others

Chapter I

Harms from Abuse of Governmental Processes

way from the organization and jurisdiction of the courts themselves, the power courts have over the subject-matter and parties, the matters of pleading and evidence, the organization of the tribunal for the particular trial and the incidents of trial, the theories of the particular cause of action, the assessment of damages, whether by way of compensation, insurance, or punishment, the aptness of the case for a preventive remedy, on through review by an appellate court and satisfaction of judgment. Needless to say that no attempt is made to deal with any of these, other than those theories, doctrines, formulas and rules which are *peculiar* to tort cases. These are burdensome enough. Normally only a few problems at most arise in a single case. The cases themselves must be relied upon to portray singly or in groups the multitudes of devices by which the process handles the matters presented by litigants. The point of view here is rather that of observation and inspection than of establishing the validity of any one rule or doctrine or theory as against another. The competition of cases themselves must do the latter, if it is desirable that it should be done.

PROTECTION

In tort cases, the protection given by the judicial process is normally thought of in terms of damages. But money recoveries may be given by way of compensation, by way of punishment, for purposes of prevention, and by way of insurance. The first two have long been recognized. The last is not recognized under the name of insurance, except

under the late workmen's compensation acts. Under these acts payments are seldom compensatory. It is believed that the idea of giving damages by way of insurance is in fact much older than this recent legislation. Such a suggestion is based on two observations: (1) In the most serious personal injuries the amounts awarded are never, or seldom at least, anywhere near the equivalent of the damage suffered, and in suits for wrongful death the recoveries in many instances can only be awarded to close relatives; (2) but of more significance is the fact that in many cases involving "dangerous instrumentalities," animals, "nuisances," there is imposed a so-called "absolute liability" which is very similar to insurance, and as imposed in these cases such insurance is at the expense of those who impose the risks.

Of almost equal significance with damages is the idea of prevention, which is constantly gaining headway as a means of protecting interests against tort harms. Such prevention is accorded most frequently by way of injunction in nuisance cases, and in cases involving interference with relations with others. The same idea is involved in the assessment of exemplary damages against a defendant whose conduct has been extreme, so that others may heed the punishment meted out and rectify their own conduct. The giving of nominal damages where no hurt has been incurred serves a similar purpose. But probably the most marked illustrations are found in the traffic and transportation, and the manufacturer of "dangerous instrumentalities" cases. In these cases the courts are very frank in

stating their purpose to be the prevention of hurts to, and the conservation of, human life.

The several sorts of protection in every blend that can well be imagined are reflected in every type of case. Other than in the simpler cases the lines fade out so that they can no longer be traced.

THEORIES, DOCTRINES, FORMULAS, RULES

The foregoing classification is structural. It barely suggests the wealth of theories, doctrines, formulas, and rules which are employed by the judicial process in the various types of cases. Nor can it be said that these instrumentalities for detail can be delineated with anything suggesting precision. Each is frequently used as a synonym for any one of the others. They vary in content from a mere catchword to a full exposition. Their usage can only be understood by familiarity with the extensive uses which are made of them. The most significant observation which can be made about them is that each type of case may have its own peculiar network of theories, doctrines, formulas, and rules.

(a) *Theories.* Responsibility in the tort field is worked out on several major *theories*. There are first, *intended* and *unintended* harms. The line between them is not a certain one. That a case falls in either is just a beginning point. The interest, the sort of harm, the protection which can be offered, the numerous counter theories and doctrines must all be considered. *Unintended harms* are further subdivided by the theories of *absolute liability*,

negligence, and *accidents*. The lines here, also, are uncertain. In both intended and unintended harms there are the further theories of rights and duties, violation of duty, causal relation, and damages.

(b) *Doctrines and formulas.* There are also major *doctrines* which are employed to make these theories operative. In *intended harms* there are the doctrines of trespass, nuisance, assault and battery, false imprisonment, deceit, misrepresentation, malicious prosecution, privacy, libel, slander, and others. These in turn are made operative through *formulas* such as intent, constructive intent, malice, the various privileges of self-defense, defense of others, defense of property, consent, equal guilt, excessive violence, provocation, scienter, material fact, caveat emptor, statement of fact and opinion, probable cause, publication, slander per se, privileged communication, excessive publication, truth, fair comment, and others.

In *unintended harms*, the doctrines of absolute liability, nuisance, *sic utere*, trespass, license, invitation, acts of God or third persons, affirmative conduct, fault, negligence, contributory negligence, gross negligence, wanton negligence, imputed negligence, assumed risk, last clear chance, independent contractor, nondelegable duties, avoidable consequences, mitigation of damages, proximate cause, direct and indirect consequences, are some of the more important ones employed. These in turn are further made operative through appropriate formulas, as unlawful use, unreasonable use, lawful use, reasonable use, dangerous things, inherent or imminently dangerous in-

strumentalities, foreseeability of harm, negligence per se, res ipsa loquitur, prima facie, the ordinary prudent man, reasonable care, highest practicable degree of care, willful and wanton conduct, discovered peril, and many others.

(c) *Rules.* In the attempt to stabilize and articulate as definitely as possible the ideas which run through these theories, doctrines and formulas, they are reduced to the form of *rules*. It is here that definition plays so large a part. These rules are frequently spoken of as "the law of torts." Many of them are required in order to present all the phases of any single theory or doctrine. Elementary text-books on Torts are in large part made up of such formal statements. The best example to be found of rule formulation in the field of torts is the work of the Torts group of the American Law Institute.

It is needless to say that each of these theories, doctrines, formulas and rules is but a stem for a cluster of variations. The proximate cause cluster is one of the best illustrations. It is in the employment of this multitude of theories, doctrines, formulas and rules that judges find the power to articulate any judgment which they are impelled to reach in deciding cases. Each of them has its own function to perform in the judicial process. They are valuable for legal purposes in the same way that the theories, doctrines, formulas and rules of any other science are valuable. They provide language facilities for handling the multitude of varied problems which are presented to courts and which require nice discriminations to be made. If they also lend themselves to poor usage, little can be done about it. No language is free from poor usage.

FACTORS WHICH CONTROL JUDGMENT

Behind theories, doctrines, formulas and rules are the factors which control judgment. They lie outside of the theories, formulas and rules employed by courts in articulating judgment, and show dimly, if at all, through them. These factors can probably never be satisfactorily formulated. In one of the essays dealing with the "duty problem," I have suggested a formulation which it is believed is useful in focusing attention upon the considerations which move courts to judgment. These factors are stated as (1) the administrative factor, (2) the moral factor, (3) the economic factor, (4) the preventive factor, (5) the justice or "capacity to bear loss" factor. These are wide terms, under which can be brought practically all the ideas of the world at large which should bear upon the everyday affairs which courthouse government must handle. Doubtless judgment is sometimes affected by the selection of the means of articulation, because the factors which control judgment are clouded by such means. In such instances, the integrity of the particular theory, doctrine, formula or rule may seem to be impaired, with the result that doubt is frequently thrown upon the validity of the decision itself. But in most instances, probably the employment of a particular theory, doctrine, formula, or rule as against another is of small significance. The selection of the means of articulation is believed to be largely a matter of taste and finesse. And the debates about the rightness and wrongness of this theory or that, the ap-

plication of this rule or that, are more frequently wasted energies than of vital importance.

Probably enough has been said to indicate the hugeness of any undertaking clearly to lay out the channels through which tort responsibility is imposed. With so many varying situations, the demands made upon even a philosophy of relativity and a flexible method of attack are exacting. Needless to say that only a few of the many types of cases are dealt with in the essays to follow, and in no one of them is anything attempted other than by way of suggesting the outlines of a rational treatment.

CHAPTER 2

ANALYSIS OF TORT CASES[1]

The discussion of any problem of law must begin with the assumption that it can be adequately handled by some accepted legal theory, or that it can be made to submit to some such theory yet to be designed. An adequate working hypothesis is as necessary to a legal science as to any other science. Needless to say there has been no comprehensive system of legal theory designed to take care of all the problems which arise under government. Any system which there may be is made up of numerous fragmentary parts, each fashioned to handle a particular group of problems, and even these larger parts are made up of still smaller fragments. For instance, there are groups of contract problems, agency problems, corporation problems, tort problems, but each one of these groups is controlled by a conglomerate of theories rather than by a single theory. Difficulties and misunderstandings arise largely out of the clashings and contradictions of a multitude of helter-skelter theories improvised for the day and perpetuated to plague legal science indefinitely.

The value of legal theory is found primarily in three requisites. (1) There can be no such thing as acceptable lump-sum judgments on complex transactions. Complicated data can only be handled reliably by breaking them

[1] Published in 35 West Virginia Law Quarterly, 323 (1929).

into parts and examining them bit by bit. An analytical device is the first demand made on legal theory. (2) The processes of government for passing judgment on the problems involved in most situations are complex. The judicial process may consist of trial judge, jury, and appellate court, to say nothing of preliminary steps taken by attorneys, commissioners, and other agencies. In order to make possible a division of labor there must be adequate machinery for allocating the functions and distributing the burdens of the process. This is the second demand on legal theory. (3) In order that the persons who are concerned in the processes of government may articulate what they are doing so that they may make themselves understood and understand others likewise engaged, and that there may be a synthesizing of the entire results of these processes, the most flexible, adaptable and comprehensive facilities for communication should be available. This is the third demand on legal theory. All these requisites are so inter-dependent that they require highly co-ordinated intellectual machinery.

In the field of torts are found a series of problems thrown together under such catch-phrases as trespass, deceit, defamation, malicious prosecution, negligence and others. Each of these series of problems has its own set-up of legal theory. A transaction or case generally awaits a classification into one of these series before it is subjected to analysis and solution. Attempts are made to keep these classifications sharply defined and set off one from the other. But about the first observation made by any one who has attempted to teach the subject of torts

is that these groups cannot be kept separate. They tend to run all over the field. Judges in their opinions intermingle the terms appropriate to the various theories in most disconcerting fashions and long before students give over the study of the first group they are talking in the terms of subsequent groups. What law teacher has not heard about negligence and equity and malice from a first year law student before the end of the first week? The instructor finds that the whole orderliness of his course is destroyed before he gets well started. These classifications are by no means exclusive. Nor can it be expected that they should be kept distinct when it is remembered how piece-meal they grew up and have been developed.

But an observation not so readily made, is that each of these larger classifications is itself made up of many smaller fragments of theories. I think it possible to state in multiple form the simplest cases which arise under any of the classifications.

Take this simple case:

P becomes enraged at some purely conventional remark of D, and answers him sharply. D rejoins with a still sharper reply. P resorts to epithets of an abusive nature. D smacks P's face. P strikes back. D knocks P down and severely hurts him. P sues D.

Without departing from the most orthodox terminology the problem can be stated in several forms.

(1) Is D guilty of an assault and battery?

(2) Was P guilty of an assault upon D?

(3) Was D acting in self defense?

(4) Did P by provoking the combat thereby consent to it?

(5) Did D in the exercise of his privilege of self-defense use excessive force?

(6) Did P provoke the combat so that the damages are to be mitigated?

Which inquiry is most pertinent?

The number of doctrinal terms is not without significance: assault, battery, self-defense, privilege, excessive force, mutual altercation, consent, provocation, mitigation. The number of rules involved is also interesting:

(1) One who intentionally puts another in apprehension of immediate harmful or offensive touching is guilty of an assault.

(2) One who intentionally inflicts violence upon another, or touches him offensively, is guilty of a battery.

(3) Mere words do not constitute an assault.

(4) One whose interest of personality is threatened by the application of immediate violence is privileged to defend himself.

(5) One who defends himself against unlawful violence must not use excessive force.

(6) One who engages in a mutual altercation thereby consents to the violence inflicted upon himself.

(7) Consent is not a defense to an unlawful act of violence.

(8) Consent is a defense to an unlawful act of violence.

(9) One who under adequate provocation makes an assault upon another is not excused but such provocation may be considered in mitigation of the damages.

These forms of statement, doctrinal terms, and rules by no means exhaust the possibilities as the concluding analysis will indicate.

If this simple case is to be submitted to a jury for determination, which of these rules and what forms of statement shall the problem take? In other more complicated cases in trespass, in deceit, in defamation, in negligence, the net-work of theory increases in complexity with the multiplicity of data.

What does this mean? The implications are numerous. Let these suffice for the time: (1) Practitioners, as well as judges, in dealing with a case will resolve it into the sort of question or theory that best adapts itself to the conclusions each may desire to reach. There are always two lawyers, at least one trial judge, and may be a large number of appellate judges. It is not at all unusual for the same case to be presented in multiple theories. (2) A multitude of arguments and disagreements may arise in dealing with a case when it is not a matter of right and wrong, but purely a matter of taste and judgment as to the form of statement.

The waste of energy in attempting to harmonize holdings of different courts when the trouble may lie in the selection of an acceptable legal theory is very large. I do not believe that it is generally appreciated what a large part this multiple choice of theories plays in our court-house government. It must be remembered that the cases as reported by the appellate courts are refined products. They are the results of a long process. They by no means indicate how the cases looked to the lawyers and judges

who tried them. Sometimes a lawyer scarcely recognizes his case after it has gone through the court of last resort. An opinion may, and frequently does, merely represent an elaboration of the theory which caught the fancy of the judge or court writing the opinion. This fact makes it difficult to look through the well developed essay of the judge and catch even a glimpse of all the competitive and conflicting theories and data from which the choice of the appellate court was made. Another judge or court might with equal assurance have reached an entirely different conclusion and thus have written a very different opinion. This is nothing more than one of the risks incident to the judicial process. But it is highly important that it be recognized that there is such a risk.

Probably the most extravagant net-work of theories employed in tort cases is found in the negligence group. The most important of these cluster about the following: (1) legal right, (2) legal duty, (3) negligence, (4) assumed risk, (5) contributory negligence, (6) last clear chance, (7) proximate cause, (8) wilful and gross negligence, (9) imputed negligence, (10) comparative negligence, (11) mitigation of damages, (12) aggravation of damages. Each of these has subdivisions.

There are very few negligence cases, if any, which cannot be stated in at least several of these theories. One lawyer or one judge will insist that a problem to be decided is a question of legal duty, another a question of assumed risk, still another a question of contributory negligence, while the appellate court may say it is one of proximate cause. Nor is there the slightest reason to say

one or the other is correct except as it may fit into the basic assumption which a person may give his inquiry, or as it may lend itself to the judgment which the particular person desires. The possibilities for this sort of thing can scarcely be exhausted.[2] Consider the possibilities for disagreement in the single theory of "proximate cause"; legal cause and cause in fact; natural cause and probable cause; intervening cause and concurrent cause; ultimate cause and intermediate cause; direct cause and remote cause; dominant cause and sole cause; and at least that many more such phrases.

In all this riot of theory and terminology is it any wonder that the courts are glutted with negligence cases? Is it remarkable that the reports are filled with dissertations which are most bewildering in their doctrinal teachings? Is it a cause for wonder that defendant's lawyers should insist upon jury trial in order to get the benefit of the errors and disagreements which fall out in such complexities?

A survey of this wilderness of methodology convinces me that there is no possibility of finding a way through

[2] Compare two recent statements:

"The broad general principles of the law have a significant habit of traveling in pairs of opposites * * *." John Dickinson, The Law Behind Law II, 25 Col. L. Rev. 285, 298 (1929).

"Legal principles—and rules as well—are in the habit of hunting in pairs * * *." W. W. Cook, 38 Yale L. J. 405, 406 (1929).

Perhaps it is more accurate to say that these principles and rules travel and hunt in "packs" instead of "pairs" and that it is seldom that there are as few as a "pair" in a "pack".

it all unless certain basic assumptions are made. One of these assumptions is the necessity for an adequate and understandable theory of analysis, which takes into account the whole [3] judicial process as it operates in tort cases. This requires nothing short of an appreciation of the part played in these cases by that "despised" subject which is called procedure. Law schools and law teachers have for a long time been attempting to divorce procedure and so-called substantive law. They have thought of law as the formal rules employed by judges rather than the whole process involving the agencies which use such rules, and the uses they make of them, as well as the net result translated in terms of dollar and cent damages. They have ignored the administration of the power we call law for the least significant part of such administration. Any suggestion for dealing with negligence and other tort cases should comprehend not only the rules of law but the administration of those rules.

The suggestion which I make involves the use of an analytical formula. I choose this because it very largely avoids reliance upon definitions and rules—those hopeless attempts to freeze into a word, or multiple words, a meaning for all times and places. Also, I choose a formu-

[3] This does not mean that the judicial process as a whole must be dealt with by any analysis which may be formulated for use in tort cases. Pleading and Evidence are parts of the process, but they need not be dealt with; they can be isolated and yet accounted for. But it is remarkable how greatly the formula later set forth simplifies the pleading issue and thereby gives direction to the evidence pertinent thereto.

la method because it merely propounds but does not pretend to answer. It permits the division of labor between judge and jury and leaves the judgment of each as free as possible. It simplifies the statement of the questions on which judgment is to be passed and leaves the person who is expected to pass it as free to survey all the factors which should influence his judgment. This formula is not a departure, for it finds support in countless decisions. It resolves a case into these problems:

1. The right-duty problem.
2. The violation of duty problem.
3. The causal relation problem.
4. The damage problem.

Let it again be emphasized that the value of such a formula is found chiefly in the flexibility it gives in allocating the various phases of a case to judge and jury as is required under our theory of government. In many cases the judge's judgment alone is required; in others a concurrence of the judgment of judge and jury is required on a *single* problem; in still others, their concurrence is required on *multiple* problems. These ideas are represented roughly by the terms questions of law, questions of fact, and mixed questions of law and fact. Each of these, however, begs the question to be determined, and it is difficult to find different terminology that does not do the same thing. Sometimes the judge's functions are spoken of as matters of policy and those of the jury as fact finding. Even these are not sufficiently descriptive. Policy is but a quick summing-up word. Questions of fact are as narrow or as broad as it is desired to make

them. I should say the judge's primary or most important functions are to pass upon the larger questions which go to limit responsibility generally, and not merely in the particular case, such as the administrative difficulties involved in such cases, the economic and moral exactions of the time and place, and the development of rules which are designed to prevent the recurrence of such hurts generally, as well as to apportion the losses in the particular and similar cases. These are the factors which are pertinent to the determination of "rights" and "duties." The latter are terms we use to symbolize the conclusions of the *judge* in imposing or denying responsibility after a summing up of all pertinent factors. So the first problem suggested by the formula falls to the judge and depends upon his judgment. It is subject to further analysis as will appear later.

On the other hand, whether in the particular case the defendant *violated his duty*, I would pass to the jury by some formula which would indicate as unrestrictively as possible upon what phase of the case the judgment of the jury should be desired. In negligence cases for instance, the "foreseeability of harm" formula is well designed for this purpose. Although the formula is framed on the so-called negligence issue, nothing less than the jury's judgment on the whole case should be desired or expected. As a matter of fact legal theory makes no pretense to determine the factors which should control the judgment of the jury beyond the delivery of a ritualistic formula, plus in some states such advisory cautions as the judge may think desirable to give. But the fact of significance as

to this problem is that the jury's judgment is restricted to the *single* case, and it has no validity beyond this.

These two problems go to the heart of a case. Here is decided responsibility or no responsibility. The duty, and violation of duty, problems require a concurrence of judgment by judge and jury; the former from the standpoint of legal science at large, the latter from the standpoint of the details of the particular case. Incidentally, in all problems which go to the jury, the judge must say if the proof makes an issue to be submitted, and if so, he must translate that problem to the jury, through an appropriate formula.

Of the two remaining problems, that of damages is of great importance, while causal relation is of minor significance. Both are easily isolated. The damage problem requires the judge to determine the sufficiency of the evidence to warrant a finding and what measurements shall be used, but once the question is submitted it is for the jury to do the measuring. Causal relation between defendant's conduct and the hurt suffered is usually so clear as not to raise an issue, but nevertheless it is habitually submitted. This incurable habit on the part of courts is not merely a futile thing; it causes great difficulties. But when a question of causal relation is properly in the case, it is for the judge to determine whether the evidence makes an issue, and to submit the issue through some appropriate formula to the jury. It is for the jury to make the finding. The courts frequently submit what appears to be this problem under a so-called "proximate cause" formula. A great deal of confusion is developed by the latter practice.

Under the analysis here suggested there would be no place for it.

Through the formula as a whole I should hope to keep the functions of judge and jury separated as clearly as possible and likewise indicate the scope their respective judgments should take through the simple subordinate formulas employed for each problem. This is the process which as a matter of fact has been developed by the courts but which has been so frequently misunderstood or disregarded. Until the scope of such process is understood, and something of its practical workability is appreciated, the intricate problems which are hidden under the terminology of "proximate cause" and other such catchwords of the judges will not yield to analysis. My suggestion therefore is that tort cases can only be understood through the procedural process to which they should be subjected by a court.

For the purposes of clarity I analyze the formula at length:

1. *The Right-Duty Problem.*

a. Has plaintiff a *right?* Does government extend protection to plaintiff's interest? Is there any rule of law designed to protect plaintiff's interest? Should plaintiff's interest be protected by law?

b. Did defendant owe plaintiff a *duty* with respect to the interest which has been injured? Is plaintiff's interest protected against the hazard which it has encountered? Is plaintiff's interest protected by the rule of law he invokes against the risk encountered? Who shall, or should,

bear the risk of plaintiff's hurt, plaintiff himself, or defendant?

b^1. It should be noted further that the inquiry is subject to great extension and variation, if the so-called defenses are developed in the several types of cases: Shall plaintiff's own "fault" (consent, equal guilt, assumed risk, contributory negligence) defeat his recovery? Or is defendant deprived of such defense by his own excessive conduct (undue advantage, last clear chance, discovered peril, gross or wilful negligence?) Is defendant protected by a privilege? (These are numerous; self defense, defense of another, or of property, puffing, competition, rival claimant, probable cause, certain confidential relations, official position, truth, fair comment, etc.) Or is defendant denied such privilege by reason of excessive use? (excessive violence by way of defense, malice, vicious motive, etc.) [4]

c. How does a judge know the answer to such a question, however it may be stated? [5]

[4] These—a, b and b^1—are all different ways of stating the same problem. There are others. Sometimes it presents a question more vividly to state it one way, sometimes another. One person may prefer one way, while another may prefer a different one. One type of case may require one form of statement, while another case requires a different form. The problem can frequently be reduced to a narrower form than here indicated. In my book, Rationale of Proximate Cause, in which numerous examples of this problem are given, I doubtless employ one or two forms of statement excessively but I found uniformity of expression of great value in developing the subject with the utmost brevity.

[5] I have discussed but not answered this inquiry in my articles:

2. *The Violation of Duty Problem.*

a. Does the evidence make an issue that defendant has violated his duty to the plaintiff? [6]

b. The translation by the judge to the jury of the issue, if made by the evidence.[7]

c. The jury determines the issue whether defendant has violated his duty.[8]

d. This entire process,[9] may be apposite to any defense noted above.[10] In other words, a jury's judgment may be desirable on a defensive issue as well as an affirmative one. As an illustration: If the judge decides that contributory negligence should be let in as a defense, then under orthodox practice if (a) there is evidence to raise the

"The Duty Problem in Negligence Cases," 28 Col. L. Rev. 1014 (1928); 29 Col. L. Rev. 255 (1920). See Shelden v. Wichita R. & Light Co., 125 Kan. 476, 264 P. 732 (1928). See Cardozo, The Paradoxes of Legal Science (1928).

[6] How does the judge know when an issue is made? How does the employment of the "reasonable inference" formula help? See discussion in Pleasant v. Fant, 22 Wall. 116, 22 L. Ed. 780 (1874); Randall v. Baltimore & O. R. Co., 109 U. S. 478, 482, 3 S. Ct. 322, 27 L. Ed. 1003 (1883); Wigmore on Evidence (2nd Ed.) § 2494.

[7] In negligence cases this is done through the "probability or foreseeability of harm" formula in some one of its many variations. I discuss this in my article, "The Negligence Issue," 37 Yale L. J. 1029 (1928). How is the issue submitted in other types of cases? The formula will be found to differ from type to type. There are numerous formulas available for this function.

[8] How does the jury find the answer? See discussion, 37 Yale L. J. 1029.

[9] 2. a, b, c.

[10] 1. b^1.

issue, (b) it must be translated to the jury, (c) for their finding.

3. *The Causal Relation Problem.*

a. Does the evidence make an issue that defendant's conduct caused plaintiff's hurt? [11]

b. The translation of the issue by the judge to the jury? [12]

c. The jury determines the issue, whether defendant's conduct was a "substantial" cause factor.[13]

4. *The Damage Problem.*[14]

a. Does the evidence make an issue as to the extent

[11] This problem seldom arises as the evidence is usually clear one way or the other. But how is the judge to know when an issue is made? The same "reasonable inference" formula should be used here as in the negligence issue. See supra, n. 6.

[12] This issue should be submitted by some variation of the "substantial factor" formula. See my article, "Are There Dependable Rules of Causation," 77 Penn. L. Rev. 601 (1929); my book, Rationale of Proximate Cause (1927) pp. 132–141.

[13] How does the jury find the answer to this question? See discussion, Penn. L. Rev., supra, n. 12.

[14] Neither casebook nor text has apparently been able to distinguish the damage problem from the other problems of responsibility. They give practically all their attention to the three problems of fixing responsibility (problems 1, 2 and 3) as opposed to the measuring of responsibility in terms of money (problem 4). No attempt will be made to deal with the problem here. I set it aside with the suggestion that the discussions of direct, consequential and remote damages have nothing whatsoever to do with the problem. Such discussions are attempts to deal with the right-duty problem in language ill adapted to such a use. A good example of this use of such terms is found in Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E.

and value of the hurt plaintiff has received to an interest as to which he may recover?[15]

b. The translation by the judge to the jury of the issue, with appropriate instructions as to the standards and measurements to be used.[16]

c. The jury determines the extent of hurt or loss and evaluates it in terms of dollars and cents?[17]

This analysis should not be misunderstood. It has no power of its own. It is merely a device for bringing to

265, 9 A. L. R. 933 (1920). It is clear that there were more important factors directing the judgment of the court in that case than the abstruse distinction between direct and consequential.

[15] How does the judge determine this? See supra, n. six.

[16] The standards and measurements which may be employed in a particular case may be numerous. The one or more which a court will use depends upon the ones made available by the pleadings and evidence in the case. Ordinarily the court will direct the jury to employ the one which seems most appropriate to the particular issue. Sometimes the one employed is not as good as one which might have been used had it been made available by the pleadings and proof. The most significant thing which can be said here is that there is no one measure which must always be used in cases which seem to be of the same type. Courts are not so lacking in resourcefulness as that, though there are many discussions in opinions and in texts which would indicate that there are standardized measures of damages for each situation, and that there is some way to find out the one which must be used. Such statements are misleading. See very interesting article on "Assessment of Damages in Personal Injury Action," by Prof. Vernon X. Miller, 4 Minn. Law Rev. 216 (1930).

[17] How does the jury arrive at the amount? They employ their judgment on this problem as they do on all other problems

the surface the significant problems of a case so that judgment can be the better passed upon them. It permits the difficulties to be located and isolated rather neatly. But it does not control judgment. It also permits the functions of those who have a part in passing judgment to be easily allocated to them and kept as distinct as possible. In doing these things it necessarily must afford the means for articulating the process as well as its result. But it is not the only way to handle tort cases—if it is merely a good way, that is enough. Doubtless something much better will be developed.

submitted to them. Their judgment is final so long as they act within the boundaries provided for their conduct, and so long as the court thinks the result not so unreasonable as to require modification or setting aside.

CHAPTER 3

THE DUTY PROBLEM *

The undertaking to restate the rules and principles developed by the English and American courts finds in the field of torts a most hopeless task. A loose classification permits an infinite variety of types of conduct to be classed as torts. The rules, for most part, which govern these cases are still liquid. Only the types of conduct which are also designated crimes can be said to be subject to crystallized rules of tort law. Even here the definiteness and certainty ordinarily assumed are illusory. If this bulk of law has not yet been crystallized by the judicial process, in what manner can legal scholars speed up the process? And what is more, where are the stabilizing factors to be found?

THE NATURE OF LAW

In order to control the conduct of our neighbors and ourselves much machinery is employed. Judges, policemen, legislatures, teachers, practitioners, principles, rules, formulas, doctrines, standards—a multitude of devices too numerous to catalog. At this whole complex of government we throw the term "law," and immediately difficulties are encountered. To this term is given a host of meanings.[1] It cannot be said that any of them are correct or in-

* This essay was first published in two parts in the Columbia Law Review (28 Col. L. Rev. 1014 (1928), 29 Col. L. Rev. 255 (1929).

correct. It is merely a matter of language. "Law" is most frequently defined as "rules recognized and acted on in courts of justice," [2] "a rule of civil conduct," [3] "command of the sovereign," [4] "the sum of rules of justice administered in a state," [5] "body of rules which the courts * * * apply in deciding cases." [6] Dean Pound says, "there are three elements that make up the whole of what we call law"; (1) legal precepts, (2) traditional ideas and technique of interpreting, developing and applying legal precepts, and (3) philosophical, political and ethical ideas as to the end of law.[7] Dean Wigmore says: "Law is the quality of being uniform and regular in a series of events. * * * Jural law is a rule expressing the relations of

[1] See Pound, The Theory of Judicial Decision (1923) 36 Harv. L. Rev. 641, 643: "Most of the discussion as to the nature of law which has been the staple of Anglo-American writing on jurisprudence has suffered from an initial false assumption that 'law' is a single conception; that the one short word has one simple analytically ascertainable meaning. As one reads the voluminous literature upon this subject he soon feels that the disputants are speaking of different things, although calling them by one name."

In this connection, Jerome Frank's recent book, Law and the Modern Mind (1930) should be read. Mr. Frank has subjected modern thought on the general subject under consideration to the clearest analysis. His book appeared while this book was in press.

[2] Salmond, Jurisprudence (5th Ed. 1916) § 5.

[3] 1 Bl. Comm. *44.

[4] Austin, Jurisprudence (Student's ed. 1875) 11, 16.

[5] Pollock, A First Book of Jurisprudence (1896) 17, 18.

[6] Gray, Nature and Sources of the Law (2d ed. 1921) 110, see generally c. IV.

[7] Pound, op. cit. supra note 1, at 645.

human conduct conceived as subject to realization by state force." [8]

In all of these concepts the power to control conduct through passing judgment is identified with the instrumentalities through which the power itself is employed. Law is identified with the machinery of law. This is a common conception of law. To a large part of our population the policeman is "the law." And this is no stranger than the more popular belief that "the law" consists of statutes and constitutions, nor is it any less accurate than that more sophisticated notion of the legal scholar that "the law" is to be found in the decisions of courts and in the rules, principles and standards which courts announce and employ. Each individual objectifies law with the devices with which he most frequently comes into contact. But all of these are merely the wiring and fixtures with which we equip our legal habitat. A decision of a case is no more law than the light from last night's lamp is electricity. We make use of decisions, statutes and constitutions for the purpose of developing and controlling the capacity to pass desirable judgments and employ these and scores of other devices in order to make judgments effectual. But that is their limit; they stop short of any power within themselves. By suggesting that law has been confused with the machinery through which it operates, I do not mean to minimize the importance of the machinery. My emphasis is that it is machinery. The gas engine and multiplication

[8] 2 Wigmore, Select Cases of the Law of Torts (1912) App. A, § 2.

table are devices without price. There can be no power without machinery; there can be no law without judges and courts and rules. But machinery without power is impotent. Hence "law" as here conceived is the power of passing judgment—the power of passing judgment through formal political agencies for securing social control.[9]

This distinction may be nothing more than a change of emphasis, but it seems to be one worth making. It implies in the beginning that law is indefinable and ungraspable.

[9] In attempting to articulate the judicial process in negligence cases there is no place to start save with a postulate as to the nature of law. No extended development of such a postulate is possible here. On the other hand it is essential that its outline be indicated. None of the concepts of law with which he has become acquainted permit the emphasis which the writer feels should be given to the administration of law. The power to pass judgment as the basis of social control is thus offered as a starting point from which it is possible to account for the behavior of judges as part of a law administration system. This is not as extravagant a theory as the concept of "power" would indicate. What is power? We might as well ask what is force. What is spirit? What is electricity? What is life? Perhaps the answer for one would be the answer to all. Probably all science gets back to the same starting point here. And whether the inquiry is futile or not is beside the point. The important thing is not what power is, but how it can be utilized. Whatever assumptions we make, however high-sounding the names we give them, the upshot is this: "Here is something we use. How can we do so to the best advantage?" But this does not mean that it is not of the utmost importance to identify this power. It is. Hence, instead of starting with some such postulate as a rule or aggregate of rules, the writer starts with the power which operates through rules. This power he calls "law."

Politically its source may be sovereignty; religiously it may be God. These are nothing more than figures of speech by which to adjust the horizons of thought in those directions. But in so far as the sources of law are *apparent,* they are found in the judgments of the individuals who are entrusted with the power to pass those judgments. And this would, in turn, imply that any science of law is, at bottom, the science of the administration of law. Once this point has been reached, the major problems of such a science stand out boldly. They are: (1) a language technic, and (2) a judging technic. To these may be added, of necessity, (3) a statistical technic.[10]

[10] No business can be operated successfully without its accounting department. Yet here is the largest business in America with no means at hand for seeing itself in operation. Little wonder it functions so poorly. Nothing speaks so highly for the soundness of our society as this ability to survive without knowing how or what society's chief protective organism is doing. How can courts modify their practices or legislatures make changes without the knowledge of results achieved from day to day by the machinery in operation? When no one knows, one person's guess is as good as another's. Guesses must give way here to facts. Something can be gained from borrowing the statistical methods of the other social sciences, but the job will probably require the development of a technic suited to the particular difficulties of law administration. The various crime surveys of the past few years look in this direction. And it is of more than passing significance that the Foundations are beginning to see the opportunities which are open at this point. Of necessity there will be many trials and errors before a pattern is developed which will lay open the results our legal machinery is producing, but that the pattern must be developed is too obvious for debate.

A LANGUAGE TECHNIC

The struggle which men are making to rise above the *word* level seems to have no end. "The power of words is the most conservative force in our lives" say Ogden and Richards.[11] Only now, if at all, is there any indication that the bonds of "holy words" are weakening. Word ritual under one guise or another has always been one of the primary methods of law administration, and the development of the uses made of words is one of the most puzzling of studies. We can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law. While historically these were among the first uses of language, nevertheless words of modern mintage frequently quickly develop these characteristics.[12] No sooner had the written word become a means of evidencing the dealings of men in every day life than it was shackled

[11] Ogden & Richards, Meaning of Meaning (1925) 25.

[12] The term "duty" for instance is a relatively new term. Is it merely a symbol, or has it some "inherent" meaning which makes it sacred? Clearly as employed in legal science it is a symbol, such as "right," "immunity" and others like them designed to reduce to a single word a network of ideas. Yet I have heard intelligent lawyers talk most earnestly of "duty" as the most sacred word in the language save "God," and develop an extravaganza as to how those other sacred words "mother" and "country" are themselves dependent upon "duty." Doubtless every such term as "right," "contract," "liberty," "property," "constitution," and numerous others, gathers the same sort of emotive qualities. What can legal science do when its terminology becomes thus gummed? There is no other science which has quite the same degree of difficulty in immunizing its language.

by all of these uses. The period of word ritual is not far back in our legal history.[13] The "oath" hangs onto our procedure with unbelievable tenacity, and generations are required to rid our administration of any formalism. Nor do we seem to make much progress here.[14] The succeeding stages of rules and principles and doctrines, with their formulas and standards reduced to well polished phrases, are still dominating our law. Probably these are even now at high tide. To this array of theological methods we have added classification and analysis, the deductive and inductive processes of logic. And with these as a basis have come attempts at perfecting a mechanics of symbols by which our rules may be made to work as precisely as the devices of numbers.[15] All of these have their utility, but the first requisite of intellectual freedom, and as much so in the study of the science of law as elsewhere, is a wholesome fear of words.

Fortunately for the common law there are strong cur-

[13] 3 Wigmore, Evidence (2d ed. 1923) §§ 1815, et seq., 2405, 2426; Thayer, Preliminary Treatise on Evidence (1898) 24, 390; 1 Williston, Contracts (1920) § 205.

[14] Professor Herman Oliphant gives a good instance: "A striking example of this is found in the fact that the legislature of Pennsylvania has enacted Professor Williston's draft of a uniform law, making any written release or promise valid and enforcible if the writing also contains an additional express statement that the signer intends to be legally bound." (1928) 14 A. B. A. J. 348. But see explanation by Professor Williston. Id. 554.

[15] Hohfeld's analysis is essentially such a scheme. Professor Kocourek's recent book, Jural Relations (1927), is a most elaborate scheme of this sort.

rents which tend to sweep its channels clear as fast as the crystallization brought about by words threatens to choke them. The common law system of administration at first had no adequate machinery for preserving with certainty and precision the words of its judges. Their reported sayings were therefore quickly weakened when reporters were found in conflict or otherwise unreliable. Moreover, the vanity, and possibly sometimes the ignorance and errors, of succeeding judges which impelled them to improve upon the statements of their predecessors, have produced a great variety and conflict in rules. Even when the doctrine of *stare decisis* was thought to have been fastened on our system of law administration, these and other forces were present to break up the crystallization of any such fantastic attempt at law petrifaction. The efforts at statute making were designed to furnish a dependable ally in this process and they doubtless would have done so except for the constant tinkerings of succeeding legislatures, together with the habits of judges, by this time confirmed, to interpret and refine both upon the statutes as well as upon their own interpretations and refinements. But of even greater potency as an antidote to word worship has always been the loose language of contemporary judges. So that with the facilities now at hand for writing, publication, and distribution of judicial essays on the cases adjudged by courts, together with the numerous adventures in legislation, the increasing range given to administrative officers outside the courts, the more perfected technic of lawyers in closing the ways that judges would make use of in their rationali-

zations if the ways were left open, as well as of opening new and unheard of ways, the infinite number of judges and book makers—with all of these, the fear of a language serfdom grows more and more remote. In fact, the fear of many is that we are swinging far beyond the point of safety the other way in allowing to judges what in effect amounts to "free decisions." [16] This movement is sought to be halted by the subsidizing of a vast amalgamation of legal scholarship, reinforced by a far reaching political organization to make the work of the scholars acceptable. But even the efforts of an American Law Institute, as helpful to legal scholarship in particular, and to law administration in general, as it has already been and will continue to be, will prove fruitless in setting up an hierarchy of rules and formulas. The day for that has gone. If such a movement should seem to succeed momentarily it is hardly to be expected that legislatures, judges and legal scholars will overcome the delightful habits of such long standing which impel them to seek changes in the order of things.

Under whatever guise it has been undertaken, the search for a language technic which would solve the difficulties of government has been the falsest hope of legal scholarship. No natural or social science has found its secrets in words and phrases and neither will the science of law. "Words are extremely imperfect tools and nobody has ever succeed-

[16] See Geny, Judicial Freedom of Decision: Its Necessity and Method, The Science of Legal Method (IX Modern Legal Philosophy Series, 1917) 15. Also Ehrlich, Judicial Freedom of Decision: Its Principles and Objects, ibid. 47, 69.

ed in mastering real things by means of mere words" says Ehrlich.[17] There is no such thing as words so plain that they are not to be interpreted. There are no premises to be found so certain that nothing more than an irrefutable logic is required. The emptiness of multitudinous terms which have served as major premises of judicial logic has long been exposed.[18] A process which assumes the very ends it is employed to discover will in the end betray its futility. It is not that a scientific language device is not desirable. It is merely that too much emphasis has been put upon it, and too much expected of it. The attempt has been made and still is made to make language do the service of judging itself. There can be no such substitution. Words are the machinery by which the power of thought is handled, but if there is no such power put into them the words are lifeless. In the administration of law, both the judge who surrenders this power to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill. His function primarily is to pass an acceptable judgment in the case before him. When the next case arises a different judgment may be desirable. But both judge and legislator seem more deeply concerned for the future than for the present, as though the future would not have its own lawgivers. The institution of government is sustained by the life of the day as are other insti-

[17] Id. 70.

[18] See Cook, Scientific Method and the Law (1927) 13 A. B. A. J. 303.

tutions. We can no more make use of the power that flowed through the words of Coke and Blackstone and Marshall than we can of the life contemporary with that power. We use their words, but their utility depends upon the power we ourselves generate. It could not be otherwise, nor is it to be regretted. As each day has its own problems, its own life to spend, it likewise will have its own language. Somehow or other thought has always found a way of articulating itself, and in a voice sufficient for the time and place.[19] There is no warrant for the fear that

[19] Holmes, Rational Basis of Legal Institutions (1923) Introduction, p. xxx. "Any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago. One might venture on the paradox that by the time a proposition becomes generally articulate it ceases to be true—because things change about as fast as they are realized." Wigmore, The Judicial Function, The Science of Legal Method, op. cit. supra note 16, Preface p. xxvi, at p. xxxv: "If we recollect the differences of personality and community, and add to those the differences caused by lapse of time and change of environment, we shall realize that words are far from fixed things; they are the most fluent and indefinite of things."

Ehrlich, op. cit. supra note 16, 47, 61: "No theory of the application of law can get around the difficulty that every body of formulated rules is in its very nature incomplete; that it is really antiquated the very moment it has been formulated. Consequently, it can hardly govern the present and never the future. No such theory will ever be able to prevent the perpetual course of evolution of the social institutions to which the law is applied, whereby the formulated rules of decisions are constantly obliged to deal with new subject-matters. And it will also never be possible to avoid the fact that the individuals intrusted with the application of the law, being children of their nation and their

a fluid language and adjustable rules are undependable. We have never had any other sort, although we have lost much by not recognizing that fact. The point is that we have looked to the wrong source for dependability. We have sought it through a technic of language instead of a technic of judging. We rather trust the machinery than its engineers.

A JUDGING TECHNIC

Probably lawyers would more widely agree upon the suggestion that the judge is the most responsible unit in our social structure—that his judgment is the most vital factor of law administration—than upon any other suggestion which could be made. About him must be built any program designed to serve a science of law. The difficulty has been to insist upon a red-blooded judge in one breath and in another insist that he be controlled by a bloodless theology. It is one thing to rely on the infallibility of rules and doctrines; it is another to trust the affairs of men to the fallibility of men's judgment. It has required a long process of painful experimenting to drive home the dreaded fact—if it be even now driven home—that men must rely upon the judgment of men and make the best of it. Says so intelligent a philosopher as Morris Cohen: "To be ruled by a judge is, to the extent that he is not bound by law, tyranny or despotism. It may often be intelligent and

age, will apply the law in the spirit of their nation and their age. * * * The most solid theories and the most powerful legislation must alike be shattered upon the rock of such realities."

benevolent, but it is tyranny just the same." [20] The eternal gropings of men to find a source of their own control beyond themselves will not down. Is there no way to control the exercise of that power we hand over to our judges save by rules of law? These are but the trappings through which judgment is passed. The most thoughtful of men stick at this point and here they turn back into the wilderness of words. But it is here that any rational administration of law must make its boldest step. It is here that the aids furnished by the multiple forms of legal terminology break down. The judging capacity requires not merely a clerk who can match phrases. Phrases can state the issue upon which judgment must be passed but they cannot pass the judgment. At this point the judge finds himself out in life at large beyond any bounds that the terminology of legal science yet knows and it is out here that the judge must find the power which sustains thought and judgment; it is out here that he must employ the processes of intelligent men generally. This hitching up of law with life is a gap that must be bridged before any mature science of law can be developed. A technic of judging finds its chief support in the depths of culture and experience which lie beyond the crusted phraseology of the opinions of judges. The control of judges is not to be found in rules, but in the fact that they are men nourished on the same thoughts and other life-giving forces as the rest of us, and are subject to be influenced by the same factors in making their judg-

[20] Cohen, Positivism and the Limits of Idealism in the Law (1927) 27 Col. L. Rev. 237, 244–245.

ments as those which influence their fellows generally. Judges, as other men, are bound by the factors which have conditioned their growth.[21] These are the very forces, which in turn determine the rules themselves that men utter. Could we but discover and articulate these factors we should know the limits of law itself.

Before such inquiry is made let the discussion take another turn. How do judges employ this power we call law? How do judges pass judgment? Has any one ever disclosed? It would seem that with the numberless judgments passed and the laborious efforts which judges have made to disclose the judgment-passing secret, there could be no mystery. But the processes of judgment are as obscure as the processes of thought. We think. (At least we say we do.) We judge. After we have judged we make use of all sorts of devices to indicate the lines our processes have followed in reaching judgment. We employ numberless mediums of expression. It is these that many minds grasp and fondle as though they themselves hid the secret of judging and by some process of devotion could be made to give up their secret. You have observed

[21] Kohler: "We overlooked completely that the lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual." From Pound, Courts and Legislation, The Science of Legal Method, op. cit. supra note 16, 202, 224.

those who cling to the words of the judge as though they possessed some occult power to determine other judgments. And possibly they do have some such power for the occult judge. There is no gainsaying that the formulas in which judgments have been couched have been highly important factors in men's dealings. Along with other uses they serve as storage cells for a legal science. They range from the tiniest one-cell order to those of the highest multiples. But how are these formulas themselves produced? How are they charged with this power of law? We seldom go behind them; we begin with them. We have our rules, our doctrines, our rights, powers, privileges, immunities, duties, etc., but where did we get them, and why do we use them as we do? When we say in a particular case that plaintiff had a right, defendant was under a duty, and the like, this but means that we have already passed judgment. We are merely using these terms to pronounce the judgment passed. The process has been concluded in some unknown way; the result is merely being vocalized. We play around with our legal technic, make use of our robust phrases, as though they disclosed the secret of our judgment. But it is a rare thing that an opinion acknowledges the forces which must have impelled the judgment pronounced.

But I do not say that judgment is any less wise or dependable on account of this fact. It may be that the precision of the automaton is more to be risked than any attempt to handle factors far too numerous and elusive to be brought under conscious control. The conception of life may be instantaneous; the passing of judgment may

only require an instant's focus. I do not know about this. But I am quite sure that as lawyers we constantly delude ourselves and likewise delude others by insisting that those delightful word jousts we call opinions are dependable guides to the workings of the judicial processes. When that stage is reached, the action has already been fought. An opinion is but the smoke which indicates the grade of mental explosive employed. Somewhere behind the curtains of legal expression lie the laboratories of our intelligence. They are not legal. They comprise all we are. Perhaps our judgments on the least item of the day are given shape there in the same way as our most solemn decision in a law suit. There lie our concentration centers as it were. There we do our work. A thousand flashes from all quarters answer our calls for power. Out of it all comes a judgment. Can we articulate these flashes? I hesitate to assert that we can, and even more so to make an attempt in that direction.

THE JUDGING AND LANGUAGE TECHNICS IN NEGLIGENCE CASES

In the class of cases known as "negligence cases" a working analysis has been rather widely adopted which will serve our purposes here. Such a case has four elements: (1) the right-duty element; (2) the negligence element; (3) the damage element; and (4) the causal relation element. Ordinarily two judgment-passing agencies are employed in these cases—the judge and jury. The appellate court is left out of the picture as such, but of course it is a very important factor, and must be considered as a

"part" of the "judge." Its function is primarily to say what the trial judge should have done. This dual tribunal requires an allocation of functions. And it is generally agreed that the problems arising under the right-duty element are for the judge, while the problems of negligence, damages and causal relation, if there is an issue raised as to them by the evidence, are for the jury under instructions. The writer has elsewhere dealt with the problems presented by the negligence and causal relation elements.[22] The inquiry here is limited to the right-duty element. Here, if at all, we may expect to find crystallized rules upon which reliance can be placed.

The theology of the lawyer is not different from that of the saint. Nor can it be avoided; we can only hope for a better brand. The passing of judgment in bulk in such a complicated matter as a law suit is a dangerous thing. Our thought processes are not a vigorous lot. They cannot be trusted in emergencies. They have little daring. Their weakness makes them cling to the very shells of words. Note the sameness of an author's writings; the monotonous repetitions in a series of opinions by the same judge; the reproduction and glossing for a generation of the two or three best opinions on any subject. Hence, on account of our weakness, we cultivate analysis and classification, logic and all of its processes, both as aids to judgment and to its articulation. How-

[22] See my book, Rationale of Proximate Cause (1927) and my articles, The Negligence Issue (1928) 37 Yale L. J. 1029; Contributory Negligence and Proximate Cause (1927) 6 N. C. L. Rev. 3.

ever faulty these may be, we find them essential to our science.

Now it is clear that when the theology of a negligence case is swept aside all that is involved is that there must be a concurrence of judgment in plaintiff's favor both by judge and jury before a defendant is required to pay the loss. The machinery for obtaining this concurrence of judgment is most troublesome; it requires the analysis indicated above. The judge passes his judgment on so-called questions of law—rights and duties; the jury on so-called questions of fact—negligence, damage, and causal relation. The judge is the dominant factor in this arrangement. He not only passes his judgment first, but determines in what cases the jury can properly pass a judgment at all,[23] as well as indicates some of the considerations which should be taken into account by the

[23] Minturn, J., in Morril v. Morril, 104 N. J. Law, 557, 142 A. 337, 339–340, 60 A. L. R. 102 (1928): "Hence it becomes imperative before legal liability for conceded damages can be imposed upon a defendant, for the court in the first instance to inquire and determine the character of duty which the law under the facts imposed upon the defendant as the basis of liability; for manifestly it cannot be conceded that the jury from their inner consciousness may evolve in every variety of tortfeasance a legal duty as the standard of liability. The rule of legal duty or the standard of human conduct under any given circumstances must be declared by the court as a preliminary to the submission of the case to the jury, and, if upon the conceded facts no rule of legal duty can be said to have been transgressed, legal liability cannot be said to supervene so as to warrant the submission of the case to the jury." See Meyer v. Benton, 74 N. J. Law, 533, 65 A. 1023 (1907).

jury in passing judgment. The determination in a particular case of what problems shall be decided by judge and what by jury is not always easy. Here in this first preliminary judges make serious errors. It is frequently much easier to decide the case than it is to determine whether the jury shall have any part in its decision. In fact this dual arrangement is a most difficult one in practice—the least understood and most costly device of law administration.

In passing his own judgment, the judge may frame his problems in a variety of forms: (1) Was the defendant under a duty, and if so, was he under a duty to plaintiff? or (2) Was plaintiff's interest protected against defendant's conduct? or (3) Plaintiff having invoked some general rule, was such rule designed to give protection to plaintiff's interest? or (4) Was such rule designed to protect plaintiff's interest against such a risk as the defendant's conduct in the particular case? In another type of case it may take the form of whether defendant's conduct makes a *prima facie* case for plaintiff, or whether defendant's conduct was privileged or justifiable. But however framed, the issue is the same: the court must say whether there is any "law" which would require defendant to bear the risk or whether plaintiff must bear his own loss. Expressed more directly, the judge must decide whether *he* would be willing to see the risk placed on defendant even though the jury should find affirmatively on this question. All of this assumes, of course, that the jury's judgment is yet to be passed, and that such judgment may or may not concur in any phase of the matter left to the jury.

Assuming it is not a pattern case how does the judge know whether there is any such "law"? How does he know how to pass judgment? How does he know what protection to give to plaintiff's interest? Inasmuch as this inquiry has come to be normally expressed in terms of "duties," let us think of this problem in these terms. Was the defendant under a duty to plaintiff? We shall be fortunate if we do not lose our direction at the outset even in this small run-way of words.

How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he find the source of duties? Do judges find them ready made? Do they assume them? Do they create them, and if so, do they create them in wholesale, or must each court create a particular duty which fits the particular case then before it? So far as I have been able to discover, the common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about. We are clearly dealing with the very processes by which law is generated. And doubtless the questions as to the paternity of these duties brought forth in case after case is embarrassing enough at best.

It would be as futile to attempt to state for the judge the limits of the law's protection in advance of the particular conduct, as it would be to state for the jury the sort of conduct they should condemn. Conduct is infinite in its variety. The most a legal science can do with the classes of cases here involved is to employ broad formulas both for judge and jury and rely upon their respective judg-

ment-passing capacity to dispose of the cases satisfactorily as they arise.[24] But judges are slow to confess even to themselves that the administration of law rests on so uncertain a foundation. We are eager to believe that this is a "government of laws and not of men." We are pained when we come face to face with the fact that there is nothing more stable in our civilization than the common fund of desires, habits and intelligence of ourselves and our neighbors. And we refuse to believe that the power of

[24] See discussion on this point in my article, The Negligence Issue, supra note 22. Dean Pound's observation with reference to legislation is equally applicable: "It is a lesson of all legal history that the most we may achieve in advance is to lay down a premise or a guiding principle and that the details of application must be the product of judicial experiment and judicial experience." Pound, op. cit. supra note 21, 227.

Judge Cardozo gives the proper dimensions: "The endless variety of the process is indeed a source of never-ceasing wonder. One would suppose after all these centuries of judging that the frontier would have vanished, that there would no longer be unsettled soil, no longer nebulae and star dust, but only peopled worlds. Yet in truth it is not so. There are topics where the law is still unformed and void. * * * I am struck by this from day to day in the course of my judicial work. I am struck by it again when following the work of the American Law Institute in the restatement of the law. One cannot have a part, however humble, in the execution of that project without a mounting sense of wonder that with all our centuries of common law development, with all our multitudinous courts and still more multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now. * * * I have noticed this particularly in connection with the law of torts. * * *" Cardozo, The Paradoxes of Legal Science (1928) 76, 77.

passing society's judgment on the every-day affairs of society can be safely intrusted to the men whom we select as judges.

Duties are usually stated in broad terms. In negligence cases this takes the form of the "duty to use reasonable care." This means little. Even when it is said that a person owes a "duty to use reasonable care (for example) towards other travellers on the highway," or "duty to provide a reasonably safe place for a servant to work," and the like, these are little more than pious aphorisms. Nothing more has been stated than that some interests of travellers on the highway and some interests of a servant are given protection by organized society-government. But what interests and how much protection, or what specifically is required of respective defendants, are in no way indicated. Something is still lacking. We must say that plaintiff's interest in his bodily integrity or in his vehicle as a traveller on the highway is protected against defendant's conduct in driving too fast, or failing to give or obey traffic signals, or driving a car without good brakes, etc., before we have stated a graspable proposition. In other words, we must say that defendant is under a duty to plaintiff to drive at a reasonable speed, give or obey signals, have good brakes, etc. And even here the pattern is barely suggested; the cloth is still uncut. We have not yet stated that a particular plaintiff has protection against a particular defendant's conduct, or that a particular defendant owes a particular plaintiff any specific duty. *And what is more remarkable, we can never say these things, save in the rarest cases, prior to the time the*

conduct to be passed upon has transpired and is presented in an actual case in court.[24a] [See Heimer v. Salisbury, 108 Conn. 180, 142 A. 749.] Aside from those few cases where duties have been stated in terms of conduct, the duty a defendant was under, or the protection a plaintiff was entitled to have, is unknowable until the case has been adjudged. And it is here that we ask, how are these duties of defendants ascertained? And how are they to be stated until they are ascertained?

The general duties stated in terms of "reasonable care" and similar abstractions are not difficult to state, but when they are so stated they go very little distance in giving aid to the judge in the particular case. The judge very quickly arrives at the point where he must say whether the generalization is applicable to the particular case; whether plaintiff is entitled to any protection under it; whether defendant was under any duty with respect to the conduct that transpired, and the interest which was injured. How can a judge know this? How can a judge say there was a duty in this case and not in that one? This is the first problem in any case. In the "mine run" of cases it may not be so very difficult because other more or less similar cases have blazed trails. But how did it happen that the trails were so blazed? The countless varieties of conduct make this problem constantly fresh. Let it be said again that this is the dimmest part of tort law, perhaps of all law. It presents the hardest problems in any field. It is the most important; it is the one at which judges quail; it is the one which is most frequently hidden in a mysticism of words.

[24a] (1928).

THE TEST OF DUTY

Here there is frequent resort to those numerous "tests" of duties which have been evolved for various types of cases.[25] For the most part these have been devised for the judge's own aid, though in some instances, judges have cleverly deceived themselves into believing that by certain devices they can get assistance from juries at this point, and some of these devices are the merest rules of thumb, or possibly even smoke screens for the particular case. Certainly there is no censure for a particular judge's "grabbing at straws" when there has been no serious at-

[25] These tests are found in many cases and are phrased in all sorts of fashions. A few of them are indicated here: Spencer, Formula of Justice (1891) § 27: "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." 1 Comyns Digest (1780) 128: "In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case to be repaired in damages." Wolf v. Des Moines Elevator Co., 126 Iowa, 659, 664, 98 N. W. 301, 302, 102 N. W. 517 (1905): "No man shall make use of his own property in such manner as to unreasonably interfere with the enjoyment on the part of others of the rights conferred upon them by law." This generalization is stated in numerous ways. One of the most interesting is found in Barger v. Barringer, 151 N. C. 433, 440, 66 S. E. 439, 442, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472 (1909): "The ancient maxim of the common law, Sic utere tuo ut alienum non laedas, is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men and said, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible."

tempt to formulate rational bases of judgment at this point.

1. *Affirmative conduct.* The most definite boundary of negligence law is the line between affirmative and negative conduct.[26] Broadly speaking no person is under a duty to another unless he has entered upon some course of conduct towards such other. As long as a person does nothing he comes under no duty imposed by law. This is one of the most dependable limitations upon duties, but it is a limitation seldom required to be made. Probably after all we are merely saying that in the tort field at least this power we call law is merely designed to *control* conduct and not to *compel* it. We have enough to do to keep our activities within control, without attempting to regulate the directions the latent energies of individuals should take. But the line of affirmative conduct has not always

[26] See Bohlen, The Basis of Affirmative Obligations in the Law of Torts (1905) 53 Am. L. Reg. 209, 237, 377; Studies in the Law of Torts (1926) 33. "It is surprising to find that every attempt to announce either judicially or in textbooks any inclusive affirmative principle of the origin of the duty of care, the primary fundamental requisite, has been unsuccessful." Ibid. pp. 209 and 33 respectively.

"There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." Bohlen, Moral Duty to Aid Others as a Basis of Tort Liability (1908) 56 U. of Pa. L. Rev. 217, 219, 316; Studies in the Law of Torts 291, 294.

been easy to draw.[27] By taking a view at too close range courts have sometimes reached results wholly out of line with the views of society at large. Take for instance the case in which defendant runs into plaintiff with an automobile or train and seriously hurts him without the violation of any duty to plaintiff. Does defendant then owe plaintiff a duty to stop and render assistance? Courts have held not.[28] But it ought to be clear that a defendant in such case is not in the position of one who had merely done *nothing* as in the case of a defendant who stands by and sees a baby run over or a blind man walk off a cliff when defendant could rescue either without danger to himself. On the contrary, the defendant has affirmatively hurt the plaintiff and in so far as affirmative conduct is concerned, defendant is well inside the lines. He may well not have violated any duty to plaintiff in hurting him, but the fact remains that he did hurt plaintiff. Now the question is entirely different. Having hurt plaintiff should the law impose a duty upon defendant to take further steps to render aid to his victim?[29] Why should it? Why should

[27] See Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, supra note 26. For citation of authorities see (1928) 12 Minn. L. Rev. 765.

[28] Union Pac. Ry. v. Cappier, 66 Kan. 649, 72 P. 281, note 69 L. R. A. 513 (1903). See recent case of Osterlind v. Hill, 263 Mass. 73, 160 N. E. 301, 56 A. L. R. 1123 (1928).

[29] See Ames' suggestion, Law and Morals (1908) 22 Harv. L. Rev. 97; Selected Essays on the Law of Torts (1924) 17. Also Bohlen's argument in his book, Studies in the Law of Torts (1926) 339. Numerous statutes now require a motorist who has a collision with another person to stop, give information disclos-

it not? The assumptions made by the courts generally preclude this most important question.

Likewise it has been assumed that a landowner for some reason is beyond the line of affirmative conduct with reference to those who come on his land and into contact with the dangerous instrumentalities which he employs there. In other words, it has been assumed with reference to the use of his land that the landowner is not subject to the duties which another person incurs by using his chattels. In most jurisdictions the assumption has been repudiated as to young children. Why were duties not always imposed on landowners in these cases? But of equal importance why do some courts now impose such duties?[30] Whatever the reasons may be for not imposing responsibility in these cases it is not because such landowners are without the lines of affirmative conduct.

ing identity, etc., and to render aid if the other person's condition requires it. The common law courts seem to have been frightened away at this point for fear they would be invading the precincts of morals, as if legal protection is not to be influenced by moral considerations.

[30] For a long time the "Turntable" or "Attractive Nuisance" doctrine was thought to be anomalous. Although many courts recognized it in some form it was placed on the most fantastic grounds. So able a writer as Jeremiah Smith vigorously opposed the doctrine. Smith, Liability of Landowners to Children Entering Without Permission (1908) 11 Harv. L. Rev. 349, 434; Selected Essays on the Law of Torts (1924) 357. In recent years the doctrine has become well established in most jurisdictions. See Hudson, The Turntable Cases in the Federal Courts (1923) 36 Harv. L. Rev. 826; Selected Essays on the Law of Torts (1924) 397; Green, Landowner v. Intruder: Intruder v.

2. *The "danger" test.* But the line between affirmative and passive conduct being conceded as a possible one, when will duties be imposed upon affirmative conduct and to what extent? After all, this is the heart of the inquiry.

Brett, M. R., in *Heaven v. Pender* made the most impressive attempt to answer this puzzling question. His formula runs like this: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." [31] His brothers on the

Landowner—Basis of Responsibility in Tort (1923) 21 Mich. L. Rev. 495. Both these writers agree, and find some support in the cases, that the landowner as any other person is to be governed by the usual requirements to exercise ordinary care in the use of his property. This was assumed as the basis of the very first case, Sioux City & P. R. R. v. Stout, 17 Wall. 657, 21 L. Ed. 745 (1873). But the courts have given practically no grounds as to why this should be so. Although the doctrine is sound it cannot yet be said to have struck bottom. Notice how one of the better recent cases glides over the troublesome point. Clark v. Longview Public Service Co., 143 Wash. 319, 255 P. 380 (1927); 28 Col. Law Rev. 249 (1928). Even so able a judge as Justice Holmes seems unable to reach the heart of the problem. United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299, 66 L. Ed. 615, 36 A. L. R. 28 (1922). Judged by the opinions, there are few situations where the emotions seem to have played so large a part, and where an appraisal of the factors and interests involved has been given so small a part.

[31] 11 Q. B. D. 503 (1883).

bench would have none of his generalization. Brett, himself, repudiated it when attempted to be used in other than personal injury cases.[32] But even though the rankest dictum, it has sufficed as a rationalization of duties in hundreds of cases. It has come to be known as the "danger" test of duty. Whenever defendant's conduct threatens danger there is a duty to take care. It thus would seem to serve as an adjustable test ready for all purposes.

Here is probably the strangest chapter in all tort law. Upon analysis it is clear that this formula is identical with the "foreseeability" or "anticipation of harm" formula. In fact, it is nothing more than the foreseeability test of "negligence," which, when spelled out, depends upon the utility of the "man of ordinary prudence" as a standard of measurement.[33] These are the test and standard by which juries determine the negligence issue, *i. e.*, the *viola-*

[32] Le Lievre v. Gould, [1893] 1 Q. B. 491.

[33] "The man of ordinary prudence" as an attempted objectification of a standard for determining the reasonableness of conduct based upon foreseeability, probable consequences, anticipation of harm, probability of harm, danger, etc., is fully discussed in my article, The Negligence Issue, supra note 22. See Bohlen's analysis, The Probable or the Natural Consequence as the Test of Liability in Negligence (1901) 40 Am. L. Reg. (N. S.) 79, 86; also op. cit. supra note 29, 1, 9: "To constitute actionable negligence there must be: (1) A duty to the plaintiff to observe care. This depends upon the probability of injury if care be not taken. (2) A standard of care not observed (constituting the breach). This again depends upon the anticipation of probable danger. * * *" The confusing of the two problems, duty and violation of duty (the judge's function with the jury's function) is believed to be very hurtful. The writer for a long time accepted

tion of duty. Now it would be passing strange if (1) the delimination of the law's protection, duty *vel non*, is to be passed over to the jury. That would end any possible hope of law crystallization; there can be no such thing as statement or restatement of the law where the jury must pass judgment; the very purpose of jury trial is to give a new deal in each case. But (2) it would be stranger still if the law should provide the judge with the same formula for use in determining the *existence* of duty as it gives to the jury for the determination of the *violation* of duty. Yet to all appearances this is exactly what has taken place. Incidentally, the very same test is repeatedly insisted on as the test of causal relation also.[34] Thus it would seem that analysis has played itself false, so that a case is seemingly to be subjected thrice to the ponderous process of the "foreseeability" formula.

But fortunately no such thing is true, nor can it be true. Courts sometimes say that in hard cases they call in the jury to determine this duty problem.[35] They may think so, but doubtless they do nothing more than let the matter

the same view. See my article, Are Negligence and Proximate Cause Determinable by the Same Test (1923) 1 Tex. L. Rev. 242, 256.

[34] Ibid. 243; Green, Rationale of Proximate Cause (1927) 177.

[35] See Bird v. St. Paul Fire & Marine Ins. Co., 224 N. Y. 47, 120 N. E. 86, 13 A. L. R. 875 (1918). Also see Holmes, The Common Law (1881) 123; Collected Legal Papers (1921) 233–234. These eminent legal scholars are not discussing the defining of duties in so many words, but they are dealing with the problems involved in marking the limitations on legal protection in difficult situations. Their suggestions fall short of the whole

go by default. It happens in this wise: By virtue of the fact that the judge is the dominant factor of the dual tribunal set up for these cases, the moment a case is passed to the jury, that moment the judge necessarily has ruled that there is a duty upon the defendant, who will be held responsible if the jury concurs in the case as presented to them. The jury's problem is ordinarily submitted at length under some variation of Brett's formula. In submitting this problem, the judge may think that he is shifting the whole burden to the jury. But he is not. He is at most merely allowing the case to be decided on the jury's problem without meeting his own squarely. But, of course, this very failure on his part necessarily operates as a ruling that there is a duty or else he never would have submitted the case to the jury at all. In other words, the judge passes on the existence of duty any way he may rule. If he consciously says there is no duty he will direct a verdict for defendant. If he consciously holds there is a duty he will submit the case to the jury on the negligence and other issues if there is any evidence raising them. But even though he tries to pass the question of duty to the jury, he cannot do so. The very passing automatically means that he has adjudged a duty to have obtained, and nothing but the jury's concurrence as to its violation is required in order to place responsibility on defendant. No other analysis of the respective functions of judge and jury will suffice.

story and perhaps are frequently taken to mean something different from what was intended. The adjustment is not an easy one to make clear.

unless it be conceded that the jury alone has the power of determining the limits of protection which government is to give the interests of litigants. This would give to juries the power to fashion law in the most difficult cases. It would be a surrender of the highest power of the judicial process to the lay members of the court. It would render any statement of the rules of law impossible. But the answer is short—no such practice is recognized. When it comes to the pinch, whatever they may say, judges do not surrender this power. They may do curious things but this is not one of them. When a judge throws a question of this sort to a jury it is because he is willing to say that in his judgment plaintiff's interest should be protected, and defendant must pay the damage if the jury think his conduct violative of the standards which are recognized in such cases.

The whole confusion comes about by the legal theology which requires substituting a *symbolic* phrase "determination of duty" for the judgment required of a judge in giving or denying the protection of government to the interest involved, and a like substitution of the figure of speech "violation of duty" for the jury's judgment giving or denying such protection. Thus our terminology gets in the way. In the cases which the judge thinks are clear he relies on his judgment alone at this point, but if he thinks the matter doubtful, our theory of the judicial process in tort cases requires the concurrence of the jury. But the jury's power is that of a concurrence or veto only. The jury's power is only exclusive in ascertaining the truth or falsity

of the evidentiary data relied on to sustain the claim. Here it may be that juries often exercise a far greater power than they should, due to the difficulties of separating their functions under a general verdict. But this is a perversion of power similar in all things to a judge's misuse of his own power in holding a doubtful case to be a clear one involving no question for the jury. His functions of saying (1) there is no evidence to go to a jury and (2) that even though there is evidence, the law clearly gives no protection in such a case, allow the widest exercise of the judicial power. Good sense and the political powers of government are the only checks against its abuse.

Nevertheless, the "danger" test of duty has great currency. In *MacPherson v. Buick Motor Co.*,[36] Cardozo, J., accepted Brett's generalization as a principle by which to hold the manufacturer of automobiles to the duty to inspect in behalf of the ultimate user of the automobile. "Because the danger is to be foreseen there is a duty to avoid the injury," he said. In *Glanzer v. Shepard*[37] the same great judge uses the same test of duty in order to hold a public weigher employed by the seller responsible to the buyer for a shortage in weight of beans. He thus extended the generalization to cover a class of injuries which Brett himself had refused to include on the ground that the rule was to be

[36] 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916). The large part which the idea of danger plays in this opinion can only be appreciated by reading it.

[37] 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425 (1922). Many types of cases are catalogued in this excellent opinion as giving support to the same basis of duty.

restricted to personal injuries.[38] Very recently he has again phrased the rule: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." [39] After a wide survey of the cases the Torts Restatement group of the American Law Institute have accepted this test, and it would seem therefore an accepted major premise of "negligence" law.[40]

It is with great deference and hesitance that I suggest the inaptness of any such test, however heartily I agree with the results reached in the cases mentioned and other cases like them. It seems entirely too misleading, and this, even as a shorthand expression under which to subsume the numerous factors which impel judgment. To eliminate dangers and hurts is, of course, one of the chief ends of law; such is the prime purpose of tort law. But the use of so wide a variable as this as a part of a language technic, either for clarifying the issues for judgment or for rationalizing judgment after it is passed, seems inapt to say the least. It is well enough to use this test as a formula to pass the case to the jury for their judgment. There it is ritual. It serves well as a graphic method of stimulating the lay-

[38] Le Lievre v. Gould, supra note 32.

[39] Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

[40] See Torts Restatement, Preliminary Draft No. 20 (Am. L. Inst. 1928) § 166. Here the phrase "unreasonable risk" is substituted for "dangerous conduct" and similar phrases. See also Seavey, Negligence—Subjective or Objective (1927) 41 Harv. L. Rev. 1.

man's consideration. He can pass his judgment as well under it as any other formula. But in calling for the judge's judgment in defining duties, why should that judgment be restricted by any such formula? There are numerous factors on which the mind of the judge must be focused before he can declare this judgment, and such a formula would seem designed to obscure them by too great a vividness concentrated upon one factor only.

No doubt the great emphasis which is given to the "danger" concept is because it graphically brings into play the factor of "experience," the greatest factor in all judgments, whether by lay or law judges. While great store has always been laid by experience, society has never given itself over to it entirely. Experience is too conservative, while society constantly calls for experiment and growth. Experience means in large part imitation, and life refuses to subject itself to imitation in all things.[41] Courts have not as a matter of fact been controlled by the prospect of danger. On the other hand, they are constantly putting approval on conduct despite its dangers. Other factors are more compelling. Judge Cardozo himself is one of the first to recognize this fact. In his recent Carpentier Lectures he says:

"We build skyscrapers, though smaller dwellings might be safer for the builders. We run railroads, though lives might be saved if we were satisfied to travel slowly. We experiment with airplanes, though pilots run the risk of death. * * * The law will not prevent the erection of

[41] Allen, Law in the Making (1927) 59–68.

skyscrapers. It may call for safety devices that will reduce the toll of lives. The law will not prevent the operation of railroads. It may call for signals and watchmen, and may raise or depress the roadbed at the crossing of a highway." [42]

He might have added much more. We give to the users of automobiles all the protection given to other persons, in the face of steadily increasing losses of life and limb.[43] We employ explosives, give our chemists and other scientists the widest latitude in their experiments, even though human life must pay the bill. In brief the law of negligence could very properly be called the law of the dangerous machine. Surely if danger were now made the test of duties, our activities would be speedily curtailed.

In the same case in which the user of an automobile was allowed to recover from the manufacturer because of personal injuries caused by a defective wheel,[44] the same court would probably have denied recovery for the injury to the

[42] Cardozo, op. cit. supra note 24, 57, 59.

[43] Over a seven year period from Jan. 1, 1919 to Dec. 31, 1927, 137,017 persons were killed by automobiles in the United States, and during the same period approximately 3,500,000 injured by the same source. See Lattin, Vicarious Liability and the Family Automobile (1928) 26 Mich. L. Rev. 846, 866. But in face of such facts the automobile is not outlawed. Courts merely invent a "family purpose" doctrine (Goss v. Williams, 196 N. C. 213, 145 S. E. 169, 172 (1928), extend a "negligence per se doctrine" and similar devices, while the legislatures require examination for licenses, registration of cars, compulsory insurance, and the like. Danger has never stopped a useful invention.

[44] Supra note 36.

automobile itself, though it was a hundred times more "foreseeable" that there would be hurt to it and consequently to plaintiff's pocket-book, than that his person would be hurt.[45] The same court would not defeat a person who rushed in front of a speeding train to save a child,[46] or walked a dangerous trestle to aid a comrade.[47] The same able judge says in such a case: "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind. * * * The emergency begets the man." [48] Courts applaud here as does all mankind. Danger we should like to eliminate, but not at too great a price. The factors which control the judgment of judges in placing the risks first upon one party and then upon another in the growing variety of cases which the activities of men are constantly presenting to courts must be found elsewhere.

3. *Suggested determinants of duty.* What are these

[45] 1 Williston, Sales (2d Ed. 1923) § 244; Windram Mfg. Co. v. Boston Blocking Co., 239 Mass. 123, 131 N. E. 454, 17 A. L. R. 669 (1921); Pine Grove Poultry Farm v. Newtown By-Products Mfg. Co., 248 N. Y. 293, 296, 162 N. E. 84, 85 (1928). But see Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N. Y. S. 131 (1915); Ellis v. Lindmark, 177 Minn. 390, 225 N. W. 395 (1929); 14 Minn. Law Rev. 306 (1930); 77 Pa. Law Rev. 388 (1929).

[46] Eckert v. Long Island R. R., 43 N. Y. 502, 3 Am. Rep. 721 (1871).

[47] Wagner v. International R. Co., 232 N. Y. 176, 133 N. E. 437, 19 A. L. R. 1 (1921).

[48] Id. also, see Johnson v. Terminal R. Ass'n of St. Louis, 320 Mo. 884, 8 S.W.(2d) 891, 61 A. L. R. 572 (1928); 77 Pa. Law Rev. 393 (1929).

factors which control judgment in defining duties? We can scarcely defer a conclusion longer.

It would seem that the process of identifying and delineating those factors is a first requisite in any serious effort to deal with the administration of this power to judge through which we seek to control our affairs. And that they do not differ in any great degree from those which control the like power of judgment in other affairs which we normally think of as outside the scope of government is constantly becoming clearer. In short, the concept of law is defined by the limits of governmental activity merely for the sake of convenience. The usages, customs and *mores* in all realms of society, from the least obligatory to the most obligatory (short of the stage when they are given cognizance in the judgments of courts, but which may be equally constraining in their respective realms) are doubtless controlled by the same factors as the judgments we call law judgments. The term law is merely a term which is most generally used to indicate *governmental* control, as opposed to other sorts of control. But law, as power to subject people to control by passing judgment, is no different in government from what it is in church, in fashion, in that mass of every day relations which prevail throughout human society. The disputes about the nature of law and the attempts to differentiate it from usage and custom [49] would seem to be of little avail. What is the end to be served? Law as an instrument of formal government is understandable. Law as a means for use by a church or

[49] See Allen, Law in the Making (1927) cc. 1 and 11.

other organization is understandable. Law as existing in customs, usages and *mores* which more formal government takes for granted, is understandable. But it is one and the same power wherever found, indivisible and ungraspable. The difficulty is not with the nature of this power. The difficulty comes in our attempt to draw distinctions in *units* of power, when all that we mean is the difference in the *uses* made of that power. Hence, my suggestion is that law, wherever found, is in turn controlled by factors largely common to all sorts of administration, whether of formal government or other forms of group activity. I realize that to name these factors is to encourage disputes as to the proper terminology. That cannot be avoided and I would not avoid it, for the factors are not objective and neither are the meanings of words. What will mean most to one, will mean least to another. There is neither hope nor need for a standardized terminology which will suffice for longer than the hour. The life of expression is no different from life in other forms. Usage, of course, is the means through which both words and classification grow, and develop symmetry; likewise it is the way of their death.

The following are believed to be the factors of most significance in influencing the determination of duties and through them the limits of the protection afforded by law. There are doubtless others:

1. The administrative factor.
2. The ethical or moral factor.
3. The economic factor.

4. The prophylactic or preventive factor.
5. The justice factor (the capacity to bear the loss).

Each of these must be satisfied somewhat in every acceptable decision. No judgment can long prove acceptable which develops very great pressure at any one of these points. No one can be overstressed, though now one and then the other will seem to be dominant. If a human desire or interest cannot be given protection without offending one or more of what might be called the "social senses" corresponding to these several factors, then it must go without protection; there is no duty to respect it. These "senses" as developed in judges and through the judicial process are therefore of the greatest importance. Their influence can be demonstrated in hundreds of cases.

THE ADMINISTRATIVE FACTOR

When it is sought to discover to what extent the purely pragmatic difficulties of operating our ponderous legal machinery affect the results, the inquiry proves baffling. Only the more important considerations can be given attention here. In the first place, there is nothing so weighty with court-room government as the *workability* of a rule or a process. If a court is asked to extend its protection to a new interest or against an unusual hazard which threatens a well established interest, it will not do so if its attempt would appear to be unduly burdensome, expensive or vain. A court will not knowingly enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business or a mass of problems

which it is not prepared to handle. On the other hand, even though a rule or practice has become antiquated and no longer meets the requirements of business, ethics, or justice, if it works easily and judges understand its operation, they will hesitate to discard it for some improved practice not yet accepted generally, even though the latter promises much greater utility. The caution of courts is due primarily to this influence rather than to that over-stressed and purely theological notion represented by *stare decisis*. Or, stated differently, the doctrine of precedent is weighty, not so much because courts either dislike improvement or feel themselves bound by prior decisions, but because changes require all sorts of adjustments that cannot be anticipated. The troubles are not limited to the single case. This in part explains why legislation creates so much trouble for courts and why they have always found so many ways of discounting it. Each court invariably sets up its own scheme of things.[50] It takes many years to extend this

[50] Here we must think of a court as the judiciary of a single jurisdiction. By the phrase, "scheme of things," I mean the sum of the methods which a court employs in handling its business. It develops all sorts of doctrines and practices which make the "local law" of any state of extreme importance. One court will not recognize the "last clear chance" or the "negligence per se" doctrines, for instance, but will get all the results of such rules by some other doctrines. One court will have nothing to do with mandamus and certiorari except in the most restricted respect, while another court will promote their use as methods of review in important cases which cannot await the ordinary processes of appeal. One court will repudiate the third party beneficiary doctrine and get the same results through some theory of trusts. One court will adopt a theory of absolute ownership of oil and

scheme of things to cover even the most important groups of problems which come before it. In the meantime all sorts of changes are taking place in the world outside. Any considerable change in the court's "scheme" may require a re-examination and realignment of many doctrines, a process which cannot be completed for years. It is little wonder that opposition is encountered when the integrity of the court's scheme of things is threatened by some new doctrine or new practice, or new demand for relief. It was as a defense for use in this sort of predicament that the doctrine of *stare decisis* became established late in the nineteenth century as applicable to substantive law principles. The short-sighted philosophy that thought government could be operated precisely by rules and doctrines and principles reached its maturity at that time, and judges, reflecting this general idea, sought by the means of the doctrine of *stare decisis* to crystallize them.[51] This doctrine has never been needed, it can be obviated in any case, but it is sometimes embarrassing and frequently

gas and spend years aligning its real property rules in accord therewith; another will adopt a no-ownership theory and align its property rules in accord therewith. There are literally hundreds of these variations which in the aggregate constitute a court's methods, and every court has them in abundance.

[51] Allen, op. cit. supra note 49, 123–146, gives a most interesting development of the doctrine of precedent. Strangely enough dural matters (Id. 143-144). As late as 1833, Parke, J., in dural matters (Id. 143–144). As late as 1833, Parke, J., in Mirehouse v. Rennell, 1 Cl. & Finn 527, 546, spoke of the doctrine merely as a "principle of decision" to be kept "steadily in view" (Id. 145). See also Pollock, First Book of Jurisprudence (4th Ed. 1918) 323 et seq.

requires subtlety in order to avoid its effects.[52] It creates infinitely more difficulties than it renders benefits.[53] For one thing a court's scheme of things may become so ponderous in the course of time that the succeeding judges cannot possibly know what their predecessors have done.

[52] Allen, op. cit. supra note 49, 148. Among other rules for interpreting precedents he says, "It is for the court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was." The ratio decidendi is all that is authoritative.

[53] Ibid. c. IV, 147. This chapter indicates the authority and operation of the doctrine. Note the elegant theological superstructure implied by the following gems from this chapter:

"Let us remind ourselves of Sir George Jessel's simple principle, that precedents are employed in order to establish principles. Throughout the whole application of the law, the principles are primary and the precedents are secondary, and if we lose sight of this fact, the precedent becomes a bad master instead of a good servant. The business of a court in deciding any particular issue is to work its way by the inductive principle, which I have mentioned, to a rule" (ibid. 159). Quare: Why be so anxious about finding "principle"? But having found it why bother further with stare decisis?

"The difference between authoritative and unauthoritative precept is only the difference between what is logically relevant and what is not. For underneath the whole elaborate structure of precedents in our courts lies a permanent foundation of fundamental legal doctrine. 'It is a dangerous thing,' says Coke, 'to alter or shake any of the fundamental rules of the common law, which in truth are the main pillars and supporters of the fabrick of the commonwealth' (Id. 164).

"We say that he is 'bound' by the decisions of higher courts. But he is bound only at his own discretion, according to his own judgment. Nothing can make the process of 'binding' merely

Courts unwittingly reverse themselves more often than otherwise, and doubtless they spend more time trying to maintain a consistency of decision than on any other one problem. Moreover, this feeling that a court must drag along the dead part of itself creates a psychological deadweight of tremendous import.

Another phase of this matter enters here. The political organization of our court systems into inferior and superior branches works heavily against change and strongly for a *status quo*. The trial judge is the most important officer of government. There is no statesmanship so valuable as that of the trial judge who has the capacity for doing business without making that an end in itself. Government can pay too high a price for administration and

automatic and mechanical, for the judge has first to decide, according to his lights, whether the illustration is really apposite to the principle he is seeking. The humblest judicial officer can disregard the most authoritative declaration of the House of Lords unless he considers that the precedent cited is 'on all fours.' It is therefore fallacious to regard the application of precedents in the courts as a mere functioning of machinery. It is a complex process, depending greatly upon the faculties of individual judges" (Id. 164).

"If it is true that precedents are employed only to discover principles, so it is true that principles are employed only to discover justice. * * * This dominant purpose all precedents, all arguments, and all principles must subserve and when precedents do not help, enlightenment must be found elsewhere. * * * To what, then, do the judges turn? To those principles of reason, morality, and social utility which are the fountain head not only of English law, but of all law" (Id. 167).

citizens have always been afraid of judges who turn their power too decidedly to efficient business methods. Yet, poor trial judges furnish the business in large part for the appellate courts. Nevertheless, our court systems tend more and more to magnify the appellate judge and to belittle the trial judge. The latter ought to be the ablest and best trained man in the judiciary. But let a trial judge show evidences of capacity and shortly he will be elevated to the appellate bench, where he is of less value, although his burdens will be made easier and his income greater. The objectives of the two courts quickly diverge. The trial court is absorbed in law administration at first hand. The appellate court is so far removed from the real controversy that it more and more becomes concerned primarily with fashioning harmonious rules and doctrines for use by trial courts. This divergence is inescapable. A theory of law which finds its roots in words and rules must necessarily have a court of final jurisdiction to interpret words and construe rules. This in turn necessitates a theology of precedent, and it also accounts for the fact that a fair adjustment of the particular case must be sacrificed, if need be, to the consistency of a legal doctrine. It is not at all remarkable, therefore, that in the final analysis, to lawyers in general, legal dogmas are dearer than either a just, ethical or pragmatic administration of law. It is worthy of note that the *stare decisis* doctrine did not mature until the maturity of the appellate court in its present day form. It is very clear that nothing less than a radical structural modification in the machinery of

our court systems can reduce to a minimum the development of a theological notion of law.[54]

But whatever may be the reasons, when a litigant asks a court to do some new thing which would break into the integrity of its own scheme of things, he must make a clear case and be able to show the way out before he even reaches a competing basis with a familiar method. Ease and certainty of performance are prime qualities of administration, rather than the net results. The most apparent antidote for these conservative factors is found in the changing personnel of the judges. The largest single factor in administration of law after all is the personality of the judge. Says Ehrlich, "There is no guarantee of justice except the personality of the judge." [55] All technics must submit to his own. All factors are given weight on his own personal scales. And there is no way to avoid this, nor should a way be sought. As an antidote it is indeed

[54] In a recent address before the Association of American Law Schools, (1928) 14 A. B. A. J. 71, Professor Herman Oliphant urges "A Return to Stare Decisis." The weight of his argument, however, is rather lodged against what he terms stare dictis. This is nothing more than legal theology, and I subscribe to what he sees in the way of danger here. But I dare suggest that there is no stare decisis of the sort he describes to make a return to. On the other hand it seems to me that the whole force of his paper is a compelling argument against the vices of legal theology and the means through which it is perpetuated, including the major one of stare decisis. It may well be that Professor Oliphant was merely putting an old face on a new form. The courts have made this sort of thing highly respectable, and it has all kinds of diplomatic advantages.

[55] Op. cit. supra note 16, 65.

a mild one. It is most remarkable how similar are the reactions of judges and their contemporaries at large. There is not much danger of any judge being either likely or able to depart very far from the beaten path, and if so, there is little danger that he can influence others to follow him. The departures which are made are so few that the slightest ones are sometimes startling. And strange to say that after some "dangerous" judge has worn his life away dissenting and protesting and now and then getting his way, he comes to stand out in the affections of succeeding generations as the one of his day and time who was worth while. With judges on the courts of final resort whose average age is over fifty years, the forces of conservatism should have gages enough. And yet the continuous processionals of both new judges and new problems work astounding changes even over a short period of twenty years. The examination and comparison of the reported cases over several of these periods disclose that despite the slowing down tendencies of all these administrative processes, the control of human conduct is constantly increasing both over widening fields and in discriminating details.

The suggestions here made are reflected in numerous instances. The whole system of equity jurisdiction found its chief sustenance in the timidity of common law judges towards giving the reliefs which a growing society demanded. In turn when the chancellors had created their own scheme of things they became obsessed with a similar timidity, and equity then became as stale as law. The common law judges were afraid that they would be "flood-

ed with litigation" and find themselves unable to prevent fraudulent use of the court's machinery. Thus they closed the door as far as they could in defamation suits. The abortive development of slander,[56] seduction,[57] and this type of suit generally is clearly due to the court's fear of its own power. The courts denied recovery for injuries resulting in death [58] and then whittled away at every corner the statute which sought to correct this parsimonious development of tort law.[59] For a long period they refused to allow recovery for the injuries produced through impairment of the physical body through nervous shock unless accompanied with physical impact,[60] and denied protection to the injured consumer of a manufactured product in absence of privity of contract with the manufacturer.[61] Only under the guise of protecting a "property" interest will

[56] I Street, Foundations of Legal Liability (1906) 278 et seq.

[57] Id. 268 et seq.

[58] Baker v. Bolton, 1 Camp. 493 (1808); Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 65 Am. Dec. 571 (1856).

[59] See Tiffany, Death by Wrongful Act (2d Ed. 1913) § 32 Bless v. Dr. C. R. Woodson Sanitarium Co., 319 Mo. 1061, 5 S.W.(2d) 367 (1928); Mellon v. Goodyear, 277 U. S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).

[60] Throckmorton, Damages for Fright (1921) 34 Harv. L. Rev. 260; Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact (1902) 50 Am. L. Reg. 141; Studies in the Law of Torts (1926) 252; Goodrich, Emotional Disturbance as Legal Damage (1922) 20 Mich. L. Rev. 497.

[61] Wilson, The New York Rule as to Nervous Shock (1926) 11 Corn. L. Q. 512, 515; (1927) 12 Corn. L. Q. 544; (1927) 13 Corn. L. Q. 151.

most courts even now interfere to prevent hurt to some of the most valued interests of personality which are identified through the emotions.[62] Due doubtless to the difficulty in framing a more drastic and yet workable formula, the progress which was being made in the field of deceit and halted prematurely by *Derry v. Peek*,[63] is just now getting well under way again.[64] And at this moment our highest court, apparently in fear that its business will grow beyond its capacity, takes every opportunity to let it be known in advance that it will have nothing to do with one of the great preventive remedies which the law has found—the power to declare the rights of parties before injury has taken place—the declaratory judgment.[65] Again and again some of our greatest judges have shown a hostility towards new methods of giving the law's protection, even after their utility has been demonstrated beyond a peradventure by other courts, which can be explained only on the theory that an institution like a court, as well as the individual human mind, may reach a stage in its

[62] See note 14 A. L. R. 295 (1920); Warren & Brandeis, The Right to Privacy (1891) 4 Harv. L. Rev. 193; (1926) 10 Minn. L. Rev. 55.

[63] 14 App. Cas. 337 (1889).

[64] International Products Co. v. Erie R. Co., 244 N. Y. 331, 155 N. E. 662, 56 A. L. R. 1377 (1927); (1927) 12 Corn. L. Q. 539; Seneca Wire & Mfg. Co. v. A. L. Leach & Co., 247 N. Y. 1, 159 N. E. 700 (1928); see (1928) 37 Yale L. J. 1141.

[65] Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 48 S. Ct. 507, 72 L. Ed. 880 (U. S. 1928). See Borchard, Declaratory Actions as "Case" or "Controversies" (1927) 36 Yale L. J. 845.

development when it closes its books and lives alone on its accumulated wealth.

A striking instance of how this factor of administration operates through a long line of cases is found in the "mental suffering" cases. As typical of the cases in which recovery was denied for injury resulting through fright caused by negligent conduct without physical impact is *Spade v. Lynn & Boston R. Co.* The court is very clear as to the basis of the decision:

"It would seem therefore that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. * * * The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." [66]

In a similar type of case, the New York Court of Appeals denied recovery, saying:

"If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection." [67]

[66] 168 Mass. 285, 288, 47 N. E. 88, 89, 38 L. R. A. 512, 60 Am. St. Rep. 393 (1897).

[67] Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 110, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604 (1896).

Holmes, C. J., in *Homans v. Boston El. Ry. Co.*,[68] in approving the denial of recovery in this class of case said: "It is an arbitrary exception based upon a notion of what is practicable." No other sustainable basis has been found for such holdings, and since the early scare of the courts has subsided, every sort of distinction is employed to get away from the rule in these states.[69]

In the leading case of *Hill v. Kimball* [70] permitting a recovery in this type of case, the court considered the whole matter closed when it concluded that there could be physical injury through fright. That there should be a recovery for such physical injury if it were in fact a result of the fright was assumed. Other courts followed this lead but it was not until the Court of King's Bench in *Dulieu v. White & Sons*,[71] repudiated the holding of the Privy Council [72] that much advance was made in extending liability in this direction. Even in that great case, after the court had done with refuting the argument in cases like *Lynn v. Spade*, it is in vain that one looks for some affirma-

[68] 180 Mass. 456, 457, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324 (1902).

[69] Clemm v. Atchison, T. & S. F. R. Co., 126 Kan. 181, 268 P. 103 (1928); Conley v. United Drug Co., 218 Mass. 238, 105 N. E. 975, L. R. A. 1915D, 830 (1914); White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N. E. 633 (1928); McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.(2d) 123 (1927). See Wilson, op. cit. supra note 61.

[70] 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618 (1890).

[71] [1901] 2 K. B. 669. See Gagnon v. Rhode Island Co., 40 R. I. 473, 101 A. 104, L. R. A. 1917E, 1047 (1917).

[72] Victorian Ry. v. Coultas, 13 App. Cas. 222 (1887).

tive basis for the decision. Assuming that the rule allowing recovery in such cases could be administered satisfactorily, why should such a duty be placed upon a defendant? Doubtless there are many good reasons, but they are withheld. In the late case of *Hambroke v. Stokes Bros.*[73] in which the English court extended the rule of the *Dulieu* case [74] so as to allow plaintiff to recover for the death of his wife caused by her fear for her children's safety, they having been put in jeopardy as she imagined, by defendant's leaving a truck improperly braked at the top of a hill, the majority judges assumed the existence of a duty and placed their discussion on the "breach of duty." Naturally once it is assumed that there is a duty in such cases, the other elements of a tort case are not difficult. It is remarkable, indeed, that such far-reaching extensions of the law as were made in these English cases should have been made with so little apparent consideration of the factors involved. The administrative difficulties, which other judges had discovered, once having been overcome, presumably nothing else was left to be done. What moved the courts to give the plaintiffs protection in these cases is largely a matter of conjecture. Probably in the first case the hardship (the factor of individual justice) of placing so severe a risk upon the plaintiff rather than the defendant whose conduct imposed it was the dominant factor. In the sec-

[73] [1925] 1 K. B. 141. But see Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S. W. 775 (1927); (1928) 26 Mich. Law Rev. 707.

[74] Supra note 67.

ond, this same factor, plus the fact that a stricter accountability of the operators of motor trucks probably appealed to the court as a means of preventing repetitions of this sort of accident [75] were very likely determinative. Possibly also the very ease with which the courts demolished the opposing arguments, not realizing that there must still be found some basis of duty, gave the courts an assurance of judgment which finds little substantial basis in the opinions. In fact, as much as the courts have ordinarily said in this direction may be found under the expansible and summarizing term called "public policy," the starting point for the study of any science of law, rather than its end, as is so generally assumed.

The same sort of situation is found in the extension of the "mental suffering" doctrine to the "telegraph cases" of which the "death message" is typical. The early case [76] which initiated this doctrine assumed the duty as being imposed by virtue of the telegraph company's offering a public service. That done, there was no further difficulty. The court, however, very emphatically cautions against a loose administration of the rule. Subsequent cases in the same jurisdiction indicate the severe struggle the courts had in determining whether the basis of responsibility was in tort or contract.[77] This was the struggle in most of the

[75] This is the "prophylactic factor" to be discussed later.

[76] So Relle v. Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805 (1881). Other courts placed the doctrine on the same basis. See Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160 (1899).

[77] Gulf C. & S. F. Ry. Co. v. Levy, 59 Tex. 542, 563, 46 Am.

states which adopted the doctrine.[78] Most courts adopted the contract theory, although the same courts make the point immaterial by a liberal extension of the third-party beneficiary doctrine, and in cases where this will not work fall back upon the tort theory.[79] Obviously the question of what sort of action is involved falls beside the point.[80] The important point still remains. Why does the law extend its protection to the emotional interest involved in these cases in absence of physical hurt? It is no easier to resolve this question when liability is considered contractual than when tortious. The answer given by the courts which uphold the doctrine ignore this question except by inference. The soundest basis for such cases is probably found in the prophylactic value it has, and here it has much to commend it. The courts which oppose rest their opposition on the administrative difficulties similar in all respects, except that they are more aggravated here, to those in other "mental suffering" cases.[81] But the doctrine once

Rep. 269 (1883); Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623 (1885); Horn v. Western Union Tel. Co., 109 Tex. 229, 194 S. W. 386, 205 S. W. 831 (1917); Western Union Tel. Co. v. Brooks, 115 Tex. 168, 279 S. W. 443 (1926); 4 Tex. L. Rev. 270, 540 (1926).

[78] I Street, op. cit. supra note 56, 471, et seq.

[79] Western Union Tel. Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851 (1901).

[80] Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294 (1895).

[81] Western Union Tel. Co. v. Wood, 57 Fed. 471, 21 L. R. A. 706 (C. C. A. 5th, 1893); Tyler v. Western Union Tel. Co., 54 F. 634 (D. C. Va. 1893); Jones v. Western Union Tel. Co., 233 F. 301 (D. C. Cal. 1916); Curtin v. Western Union Tel. Co., 15

being set afloat, the duty element once having been assumed, it is remarkable what extensions the idea has received.[82]

A recent New York case [83] illustrates the growth in this direction. A father died aboard ship. His body was embalmed and carried for several days, and then for some unexplained reason, buried at sea while the ship was only twenty-four hours out from New York. Notice could have been given to the plaintiff, a son, but such was not done until after the ship arrived in port. The court allowed a recovery to the son on the ground that the ship was under a duty to notify him and hold the body at his direction, though the court repudiated the contention that the action was based upon a property interest in the corpse. But there can be found in the opinion no trace of the factors which moved the court to allow a recovery here when it repudiates the same idea in the telegraph cases.[84]

App. Div. 253, 42 N. Y. S. 1109 (1897); Western Union Tel. Co. v. Chouteau, 28 Okl. 664, 115 P. 879, 49 L. R. A. (N. S.) 206 note, Ann. Cas. 1912D, 824 (1911). Lurton J., in Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 721, 8 S. W. 574, 6 Am. St. Rep. 861 (1888), dissenting said: "Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages. • • •"

[82] See Westesen v. Olathe State Bank, 78 Colo. 217, 240 P. 689, 44 A. L. R. 1484 (1925); (1926) 10 Minn. L. Rev. 434. See also (1922) 6 Minn. L. Rev. 321.

[83] Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715, L. R. A. 1917E, 852, Ann. Cas. 1917D, 726 (1917).

[84] Curtin v. The Western Union Tel. Co., supra note 81.

Equally interesting is the fact that when such emotional disturbances are caused by intentional conduct on the defendant's part, although physical force is absent, courts unhesitatingly give protection, although they give few hints as to why they do so.[85] In short, here is an enormous field which is being dealt with, no doubt carefully enough, but with slight intimations from the courts that they give any consideration to the factors involved other than those of administration. Similar observations can be made in many series of cases.

In the celebrated case of *Winterbottom v. Wright*,[86] Lord Abinger said: "We ought not to permit a doubt to rest upon this subject for our doing so might be the means of letting in upon us an infinity of actions. * * * Unless we confine the operation of such contracts as these to the parties who entered them, the most absurd and outrageous consequences, to which I see no limit, would ensue." Alderson, B., in the same case said: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go fifty. The only real argument in favor of the action is that this is a case of

[85] Nickerson v. Hodges, 146 La. 735, 84 So. 37, 9 A. L. R. 361 (1920); Janvier v. Sweeney [1919] 2 K. B. 316; Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 772 (1926); see (1927) 36 Yale L. J. 1148; Boyle v. Chandler (Del. Super.) 138 A. 273 (1927); Dunn & Co. v. Smith (Tex. Civ. App.) 74 S. W. 576 (1903); Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299, 44 A. L. R. 425, note 429 (1925).

[86] 10 M. & W. 109 (1842).

hardship." Rolfe, B., agreed: "* * * it is, no doubt, a hardship upon the plaintiff to be without a remedy, but, by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." Thus the court was impelled to find no duty although the justice factor strongly demanded judgment the other way. And of the many cases which have dealt with the so-called "dangerous instrumentality" those in which recovery has been denied stick close to these reasons. The so-called exceptions [87] found in the poison drug cases,[88] the food cases,[89] as well as those involving mechanical devices,[90] have, it is true, about eaten the rule away. But even so, the courts have satisfied themselves largely by repudiating the arguments based upon administrative difficulties, and have given little foundation for their cases to rest upon. The different forms of statement are indicated in a recent Tennessee case:[91]

"Practically all the modern cases are to the effect that the ultimate consumer of foods, medicines, or beverages may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles.

[87] See Huset v. J. I. Case Threshing Machine Co., 120 F. 865 (C. C. A. 8th, 1903).

[88] Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (1852).

[89] Perkins, Unwholesome Food as a Source of Liability (1919) 5 Iowa L. Bull. 6, 86.

[90] MacPherson v. Buick Co., supra note 36; Heckel v. Ford Motor Co., 101 N. J. Law, 385, 128 A. 242, 39 A. L. R. 989 (1925).

[91] Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 29, 177 S. W. 80, 81 (1914). See 77 Pa. L. Rev. 388, 392 (1929).

* * * Some of the cases place the liability on the ground heretofore stated (*imminently dangerous* to human life or health). Others place it on *pure food statutes*. Others say there is an *implied warranty* when goods are dispensed in original packages, which is available to all damaged by their use, and another case says that the liability rests upon the demands of *social justice*."

Then mark the concluding sentence:

"Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, *the result is eminently satisfactory*, conducive to the public welfare, and *one which we approve*." (Italics mine.)

Here is a healthy pragmatism which ought to encourage judges to observe the mocking emptiness of much of their theology. Good reasons are seldom far afield for any conclusion which commends itself strongly. But if they cannot be articulated, at least the conclusion can be stated with decisiveness.

There are, of course, other constraining considerations aside from those of administration. But if I were hazarding a guess I should say that the administrative difficulties have always been the first to present themselves to common law courts, and it is only after they have been overcome that the remaining factors are given the recognition which we sometimes feel they should have. These difficulties of administration are always of greatest significance in any new development of the law, and probably stand out more distinctly in other types of cases than they do in negligence cases, as will be illustrated later. Duties must

await the court's finding a workable method by which they can be given meaning. Morals, justice, business and purification of the social stream by prophylactic treatment, must all abide the time when the court has adjusted its scheme of things to the exigencies of its internal affairs.

CHAPTER 4

THE DUTY PROBLEM II

THE MORAL, ECONOMIC, PREVENTIVE AND JUSTICE FACTORS

In the part of this paper published in an earlier number of the Review,[1] I sought to develop the idea that legal "duties" are determined by factors outside any legal theory which has yet crystallized. These factors were designated: (1) The administrative factor; (2) the moral or ethical factor; (3) the economic factor; (4) the prophylactic factor; (5) the justice factor. The first was briefly discussed. Space limitations require that the others be dealt with in gross rather than singly,[2] and in view of this I hastily point the direction taken by each of them.

Probably the moral or ethical factor, best indicated in legal theory by "liability based on fault," is the most compelling influence upon judges when administration offers no obstacles. However hard to subject to definition, the stabilization which the force we call morality gives is not to be doubted. The term is so broad and vague that it threatens to envelop all other factors. Probably for the

[1] (1928) 28 Col. L. Rev. 1014.

[2] The difficulties of handling briefly the great mass of materials which lend themselves to this analysis are insuperable. It is probably better to run the story through than to lose it by over elaboration. I have chosen only a small part of the available materials and have refrained from giving references to support many generally accepted propositions. I have frequently cited articles and books rather than give a list of cases.

purposes of this discussion it can best be identified by that partly philosophical, partly religious, partly ethical texture of intellectual tenets which reached their crest in the eighteenth and nineteenth centuries. Here man was a free agent to be left to his own fortunes; he was fully capable of caring for himself; his conduct was either good or bad; through all things an eternal purpose ran; and all society must be ordered accordingly. Not far behind this moral-fibred order are the practical affairs of everyday life. In fact, to what extent the demands of a bread and butter existence control morals themselves is not a soluble inquiry. The two influences are never found divorced. A feudal economy required a morality of trespass; an emerging industrialism a morality of negligence.

But in contrast with both moral and economic factors, which focus primarily upon the past and immediate present, is found a very strong desire on the part of judges, as well as other people, to fashion rules for a healthful future. Judges are inveterate prophets and legislators. They scale their penalties, they impose damages, both punitive and compensatory, not merely for the individual offender's lesson, but as a preventive of future harms. They spend much time fashioning prophylactic rules both of substantive and procedural design in their efforts to purify the social stream through the judicial process.[3] Finally,

[3] There are numerous instances of this sort. The decision in MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916) is a striking one. As an antitoxin to human hurts it ranks along with those which medical science has discovered. It is the same preventive

when these other factors are not cramping, judges give attention to the parties before them. They place the loss where it will be felt the least and can best be borne. Despite protestation there is one "law" for the rich and strong and another for the poor and weak. Other factors being in equilibrium, the hurt plaintiff captures the heart of

as employed against the manufacturers of drugs and food and electrical appliances, etc. (1928) 38 Yale L. J. 399. The "highest practicable degree of care" imposed upon railway carriers of passengers, and the exactions as to spark arresters for preventing fires are for a similar purpose. But these rules are not enough in themselves. Courts have supported them by a so-called "res ipsa loquitur" rule of evidence, a remarkable creation for making effective the administration of the prophylaxis. See Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724. The railway passenger cases were once the normal damage suit, but they are now seldom litigated. The stringent rules in these and similar cases make it useless for defendants to litigate any but the most extreme cases. The habitual use of presumptions as prophylactic measures is of course well recognized. One of the most effective uses of such a makeweight in combination with assessing damages is found in the "chimney sweeper's" case, Armory v. Delemirie, 1 Strange, 505 (1722). This case foreshadows the severe "highest intermediate value" rule. See McCormick, Highest Intermediate Value and Damages for Lost Chances (1924) 3 Tex. L. Rev. 44. Another instance in a different field is the refusal of the Texas Supreme Court to give countenance to the Massachusetts Trust. This form of business organization lent itself too readily to the "oil frauds" which sprang up in Texas to dupe both residents and non-residents. The court would give it no recognition, although in getting rid of it, great violence had to be done to many well settled principles of law. See Thompson v. Schmitt, 115 Tex. 53, 274 S. W. 554 (1925) and an excellent comment (1928) 37 Yale L. J. 1103, 1114.

judge and jury alike. This is justice. It is not the usual thing for judges to minister justice, for most frequently procedure, and "fault," and business, and future welfare require that justice wait until law has made adjustments on a larger scale.[4]

[4] One of the best illustrations of the suggestion here made is found in the recent wire tapping cases. Olmstead v. U. S., 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (U. S. 1928). Barely hidden beneath the crust of constitutional phrascology of the majority opinion is the apprehension for the administrative processes of courts if the 4th Amendment is to be given the sweeping scope contended for and if the main lines of a case must be halted to await the determination of incidental issues involving the means of procuring evidence otherwise tellingly relevant. Against this factor Justice Brandeis sets off several different ones: (1) that other phase of administration which requires that it be stopped short of destroying the "liberty" it is designed to protect; (2) the desire to keep the court's scheme of administration in alignment with the progress of science. Here he is emphatic: "The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. * * * Advances in the psychic and related sciences may bring means of exploring unexpected beliefs, thoughts and emotions." Id. 571. The need of a preventive against probable future ills weighs heavily with this Justice. Also (3) he added, to these the moral consideration that the government has sought "to avail itself of the fruits" of crimes "to accomplish its own ends." Id. 574. Justice Holmes further bolsters this moral argument by dubbing the practice of paying for and accepting evidence obtained by methods which the government professes to condemn "a dirty business." Ibid. 575. Conservative Justice Butler, not satisfied with the majority view, nor with the contrary view falls back upon the time honored technic of construing "words" and "principles." He says: "This court has always construed the Constitution in the light of the principles upon

Much of the so-called progress made in legal science is of this sort—a realignment of word patterns. The opportunism in making classifications is constantly overlooked. There is no requirement that the legitimacy of a present useful way of looking at the legal set-up must be traceable back into the centuries. Where morals end and economics begin, where prevention against future harms rather than a present justice to the parties before it dominates a court, is candidly the writer's own story. Each of these factors can be translated into any one of the others. Each can be noun or qualifying adjective as taste dictates. They are laid out separately here because they

which it was founded. The * * * literal meaning of the words used do not measure the purpose or scope of its provisions. * * *" Id. 576. While all of these factors are pressed with the greatest vigor and ability, it is strange that there is not a single reference to the justness of the conviction. Was defendant guilty? Doubtless that was assumed. But justice had to wait until other matters were ironed out. In extenuation it may be said that the "order granting certiorari was to limit the argument to a single question." But Justice Stone aptly closes that escape with the remark: "I do not understand that it restrains the court from a consideration of any question which we find to be presented by the record for * * * this court determines a case here on certiorari 'with the same power and authority and with like effect, as if the cause had been brought here by unrestricted writ of error or appeal.'" Id. 576. My comment is not a criticism of this or other courts for making the merits of the individual case await upon these other factors; it is merely to indicate that they do it. Incidentally, the influence of the administrative factor in shaping the rule here in question is neatly developed in a series of recent comments by Richard J. Smith. See (1926–27) 36 Yale L. J. 536, 988 and (1928) 38 Yale L. J. 77.

seem of greater importance in that form. They are inseparably intertwined in the earlier centuries, and doubtless they can only be distinguished now because use can be made of such distinctions. And may I indicate at this point that the objective of the discussion is to suggest that the larger problems of legal protection and responsibility are not soluble alone by formulas, doctrines, rules, phrases, definitions, or other devices of dialectic? I anticipate a further suggestion, *viz.*, it is high time that attempts were being made to consolidate the few gains which have been made in dealing with these larger problems, rather than giving energies to the refinement of a technic of detail already obsolescent.

EARLY LEGAL THEORY

The early centuries—the twelfth and thirteenth particularly—are dim even to the eyes of a highly equipped historian.[5] The myths which have grown up about the judicial process of those obscure days never cease to give trouble.[6] So able a scholar as Dean Ames concluded that "early law is formal and unmoral" and that the "ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." [7] A similar attitude

[5] Woodbine, The Origins of the Action of Trespass (1924) 33 Yale L. J. 799.

[6] Winfield, The Myth of Absolute Liability (1926) 42 Law Q. Rev. 37.

[7] Ames, Law and Morals (1908) 32 Harv. L. Rev. 97; Selected Essays on the Law of Torts (1924) 1.

on the part of numerous writers is well stated by Street.[8] "In the field of trespass liability is based solely upon the fact that damage is directly done by force. No consideration is here taken of the moral qualities of the act which results in damage. The actor may or may not be culpable or morally blameworthy." We have had much legal theory revolving about such terms as "absolute liability," or "acting at peril" as opposed to "liability based on fault" as though they were contradictory. Reconciliations have been thought necessary as though responsibility is less moral when strict and highly moral when excuses are more liberally recognized.[9] Probably this is more a matter of colorful language than anything else. It is hardly to be imagined that there was ever a time when the particular dispute was settled without reference to the reaction of the community as a whole to the decision. Over and above the hardships which a decision might impose upon a party to the litigation there must have always been a feeling that a general policy was involved. The highest quality of statesmanship is constantly exhibited in the settling of the specific dispute. The judicial process of the common law owes its strength to such statesmanship. It is not any longer venturesome to assume that the judgments of courts in the earlier centuries, like those of the present, are only to be understood in the light of the results which the judges thought the social order of the times required. And while there have been constant changes

[8] 1 Street, Foundations Legal Liability (1906) 2.

[9] Isaacs, Fault and Liability (1918) 31 Harv. L. Rev. 954 (1918); Selected Essays on the Law of Torts (1924) 235.

in the weight given the moral factor, as distinguished from the economic and other factors, it is probably nearer the truth to say that such emphasis has lessened rather than grown, and that instead of the responsibility of the earlier centuries being unmoral, it was more strictly moral than that of today. Another way of saying the same thing is that our morality has been expanded and liberalized.

The protection which early common law courts gave to the individual against harms to his interest of personality was given under the action of trespass.[10] The risks against which protection was given under this action were few. Personal violence, or its threat, was the dominant one. All in all it seems that probably too much weight has been given the few fragmentarily reported cases and sweeping dicta which appear before the 1800's as to the arbitrariness with which responsibility was imposed under this action. Dean Wigmore has outlined the development which took place.[11] He says: "The evidence seems certain that the rationalization towards the line of present standards began at a much earlier period than has been supposed. In other words, there has never been a time, in English law, since (say) the early 1500's, when the defendant in an action for trespass was not allowed to appeal to some standard of blame or fault in addition to and beyond the mere question of his act having been voluntary; *i. e.*, granting

[10] Woodbine, The Origins of the Action of Trespass (1925) 34 Yale L. J. 367–370.

[11] Responsibility for Tortious Acts, Its History (1894) 7 Harv. L. Rev. 315, 383, 441; Selected Essays on the Law of Torts (1924) 18 et seq.

a voluntary act, he might still excuse himself (apart from excuses of self defense, consent and the like)." [12] My only doubt here is that Dean Wigmore has been too conservative and did not set the beginning far enough back, say even before the origin of the action of trespass.[13] The phrases "acting at peril," "inevitable accident," "utterly without fault," "inevitable necessity" and similar phrases, are so vague and general that almost anything can be read into them. The few cases and illustrations of responsibility for unintentional hurts which appear, in so far as the facts are given, could as well as not be instances of highly probable, though unintended, hurts.[14] There is no reason to suppose that they were not. And the same cases today under our more liberal rules would doubtless entail severe responsibility. When further classification brought trespass on the case into prominence, the question which troubled the courts was not responsibility but whether the action was case or trespass. This is fully illustrated by cases both before and after *Scott v. Shepherd*.[15] It was only after the distinctions between trespass and trespass on the case became of little practical importance, so far as the protection of bodily integrity against the harms of violence was concerned, that courts were called upon to

[12] At p. 66 of Selected Essays on the Law of Torts (1924).

[13] Winfield, op. cit. supra note 6.

[14] See Appendix to Dean Wigmore's concluding article in Selected Essays on the Law of Torts (1924) 79. But see Holdsworth, History of English Law (1909) vol. 2, pp. 50–52, vol. 3, pp. 375–382.

[15] 2 Wm. Bl. 892 (1773).

state with clearness and fullness the excuses and limitations hidden beneath those general vague terms in earlier use. Likewise, it was only then that there was any necessity of making the full distinctions between intentional and negligent hurts. It was the latter class in which the tremendous expansion both of risks and protection came about.

MASTER AND SERVANT CASES

The negligence network of legal theory was still formative when the industrial adventures of the 1800's were sent forward on so many lines by the use of steam and the numerous mechanical devices which followed its advent. The railroad, the steamboat, the saw mill, the cotton gin, the factories of all descriptions, gave this new legal set up all the work it could do. They likewise gave in the course of the century the old relation of master and servant an entirely new societal significance.[16] And it is this relation about which so much of the responsibility imposed for unintentional hurts grew up. Here there began a struggle between a legal theory woven of medieval morality and the demands of an ever expanding industrialism which has only now culminated in a victory for the latter. Fogs were never thicker than those produced in the thinking of judges about the protection which should be given against the risks to which the interest of personality was subjected by such developments. When the master-servant

[16] See Beard, Whither Mankind (1928) c. V (Labor), by Sidney and Beatrice Webb.

cases first began to come before the courts, it must be remembered that the negligence theory was freshly spun. The idea had emerged definitely through the action on the case. It had come into conflict with the action of trespass and trespass was giving ground before it rapidly.[17] Assumed risk had found a place as a defense.[18] As late as 1820 it had served to defeat an action against a landowner who had set spring-guns in the wood into which plaintiff had walked, knowing that there were guns in the wood.[19] Contributory negligence had begun to emerge as a dis-

[17] Leame v. Bray, 3 East, 593 (1803); Wakeman v. Robinson, 1 Bing. 213 (1823); Sharrod v. Ry. Co., 4 Ex. 584 (1849); Holmes v. Mather, L. R. 10 Ex. 261 (1875).

[18] Cruden v. Fentham, 2 Esp. 685 (1799); Clay v. Wood, 5 Esp. 44 (1803); Bohlen, Voluntary Assumption of Risk (1906) 20 Harv. L. Rev. 14, 19; Selected Essays on The Law of Torts (1924) 497.

[19] Ilott v. Wilkes, 3 Barn. & Ald. 308 (1820). Many interesting arguments indicating strong practical tendencies were made by the judges in this case. Although the guns were merely set to prevent trespasses and not to preserve game, Best, J., makes this argument: "If you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country. Their poor neighbors will thus lose their protection and kind offices; and the Government, the support that it derives from an independent, enlightened and unpaid magistracy." Id. 320. Compare the equally strong moral argument of the same judge in Bird v. Holbrook, 4 Bing. 628, 641–643 (1828) (a spring gun case in which plaintiff had no notice) * * * but there is no act which Christianity forbids, that the law will not reach; if it were otherwise, Christianity would not be as it has always been held to be, part of the law of England. * * * But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means

tinct sort of assumed risk.[20] "The ordinary prudent man" had been definitely brought over from the bailment cases.[21] *Davies v. Mann* [22] as a limitation upon the newly discovered defense device of contributory negligence was just in the offing.

The master had long been responsible to third persons for unintentional hurts caused by a servant's conduct, but he had never been called to account to a servant for negligent hurts caused either by another servant or the master himself. A servant had assumed the risks of his employment.[23] Only at a very late date and in the most extreme cases was the servant given relief even against the harms intentionally inflicted upon him by the master.[24] Unintended harms were wholly out of the question as a basis of responsibility.

This was the background for *Priestly v. Fowler* in 1837.[25] The case was very simple. Plaintiff, a servant, had received injuries to his person on account of the defects in a van which had been overloaded, both the defects and overloading being alleged to be due to the negligence of the defendant, so that when the van broke down the plaintiff was thrown with violence to the ground.

which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion."

[20] Butterfield v. Forrester, 11 East, 60 (1809).

[21] Vaughn v. Menlove, 3 Bing. N. C. 468 (1837).

[22] 10 Mees. & W. 546 (1842).

[23] Southcote v. Stanley, 1 Hurl. & N. 247 (1856).

[24] See 1 Labatt, Master & Servant (2d Ed. 1913) § 256.

[25] 3 Mees. & W. 1 (1837).

Plaintiff had judgment, and rule was obtained to show cause why the judgment should not be arrested, on the ground that defendant was not liable in law under the circumstances stated in the declaration. Every benefit was given to the pleading, and Lord Abinger, speaking for the court of Exchequer recognized the responsibility of a master for the acts of his servant, but held there was no responsibility in this case. He said:

"It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon *general principles*, and in doing so we are at liberty to look at the *consequences* of a decision the one way or the other.

If the master be liable to the servant in this action, the *principle* of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage, he is responsible for the negligence of his coachmaker, or his harnessmaker, or his coachman."

Thus Lord Abinger argues that to allow this action will be letting the master in for a great responsibility indeed. For, if the master is liable, for his own negligence, he will be liable for his servant's negligence also. The economic disruption of the domestic establishment as visioned by this judge cannot be portrayed save in his own words. He continues:

"The footman, therefore, who rides behind the carriage, may have an action against the master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harnessmaker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity of these consequences, affords a sufficient argument against the application of this principle to the present case."

Thus Lord Abinger parades the dreadful *economic* consequences of such a principle to foreclose any hope servants might have had for compensation for hurts received in the service of their masters. But not satisfied with this argument, he resorts to a long recognized *legal* doctrine:

"But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may rea-

sonably be expected to do of himself. * * * The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

The court would invoke against the servant—a free agent—the defense of assumed risk in both its original form and as developed under the new doctrine of contributory negligence. But of most striking significance is this final prophylactic argument:

"In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."

Thus was used the final argument which has been used in so many cases in which the courts are anxious to set up some rule which will purge and purify the conduct of human beings in their contacts. It is the judicial prophylaxis. Here by denying recovery to servants injured by the negligence of other servants, the maximum of protection would be exacted in behalf of their master's interests in

order that they themselves would not be hurt. By virtue of the desire of self preservation servants would be purged of their carelessness, and their conduct purified by the caution of self interest. A capital argument: And of all the subsequent cases, few, if any, got beyond the factors here relied upon, and in none were they stated more convincingly. Probably they were too convincing inasmuch as courts continued to rely on the arguments long after the factors beneath had fallen into radically different alignment. But notice that in this original case there was not a word spoken about the risk-bearing capacity as between the two parties to the litigation. As usual the court was more interested in the economy of the day—in principle—in rule making—in theory—than in justice. The complexity of human affairs constantly calls for just such treatment. Courts administer "law," the power of society to order itself; justice is one of the factors which determine how that power should be administered.

Two master-servant cases arose almost immediately after *Priestly v. Fowler;* one in South Carolina,[26] the other in Massachusetts.[27] Both cases involved injuries to railroad operatives by the negligence of other employees. Apparently without having the benefit of the English precedent, the South Carolina court reached the same conclusion and stressed the same factors with about the same emphasis. The same principles were held to govern the

[26] Murray v. South Carolina R. Co., 1 McMul. 385, 36 Am. Dec. 268 (1841).

[27] Farwell v. Boston & W. R. Corp., 4 Mete. (Mass.) 49, 38 Am. Dec. 339 (1842).

risks arising out of the new adventure of railroading as governed those incident to operating a van. For approximately half a century it apparently did not occur to lawyers that the assumptions (principles) at the basis of the master-servant relation with reference to horse drawn vehicles were inadequate as a basis of the same relation in railroad operations.[28] Chief Justice Shaw for the Massachusetts court accepted both the conclusions and reasoning of the other two courts. He probably stressed even more than Lord Abinger the desirability of such a rule in order to protect the servant against the negligent conduct of his fellows. With this case the "fellow servant" doctrine became well settled, and probably no limitation upon the negligence theory of liability was ever employed so successfully. The English courts further emphasized it and the American courts did likewise.[29] The name itself indi-

[28] One of the first protests is found in the opinion of Byles, J., in Clarke v. Holmes, 7 Hurl. & N. 937, 947 (1862). He says: "But the principles laid down in Priestly v. Fowler, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery."

[29] Pollock, C. B., in Vose v. The Lancashire & Yorkshire Ry., 2 Hurl. & N. 728, 734 (1858), said: "Few rules of law are of greater practical importance. The law must have been the same long before it was enunciated in this court in the case of Priestly v. Fowler. * * * If not, such actions would have been of frequent occurrence. No such action, however, appears ever to have been brought before the decision of that case. We ought not to allow so important a decision to be frittered away by minute distinctions or the ingenuity of advocates."

cates that the voluntary assumption of risk was the dominant idea in this defense, although the other ideas stressed by Lord Abinger furnished substantial support.

The same idea was at the basis of other defenses to actions by servants. In any case of this type if the servant knew the conditions of his employment, or was in a position where he should know the conditions as well as the master, he was held to have assumed the risks incident to such employment. The negligence of fellow servants was merely a part of this larger doctrine of assumed risk,[30] which was given the broadest application for many years.[31] In fact there was very little need of translating the risks to which servants were subjected into terms of contributory negligence until much later,[32] but when that was done the

[30] Alderson, B., in Hutchinson v. The York, Newcastle and Berwick Ry., 5 Ex. 341, 351 (1850) said: "The principle is, that a servant, when he engaged to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both."

[31] Skipp v. The Eastern Counties Ry., 9 Ex. 223 (1853); Dynen v. Leach, 26 L. J. (N. S.) Ex. 221 (1857); Woodley v. Metropolitan District Ry., 2 Ex. D. 384 (1877); Clarke v. Holmes, 7 Hurl. & N. 937 (1862). See 17 Law Notes 206 (Am. 1914.)

[32] There are very few cases of contributory negligence on part of servants prior to 1870. See Senior v. Ward, 1 El. 385 (1859); Clark v. Holmes, 7 Hurl. & N. 937 (1862); Brown v. Maxwell, 6 Hill (N. Y.) 592, 41 Am. Dec. 771 (1844). In Wharton, Negligence (1874) there are very few early cases cited. See § 244. In Shearman & Redfield, Negligence (3d Ed. 1874), there are few such cases. But in the 4th edition (1888) there are several see-

assumption of risk idea was given its largest extension. It is generally stated that contributory negligence is something distinct from assumed risk,[33] but it is believed that such opinion is due to the refinements made necessary by the numerous doctrinal conflicts of the late 1800's.[34] Contributory negligence is merely a label for the sorts of assumed risks apposite to negligence. This term doubtless sounded less harsh and more righteous, especially at a time when assumed risk was being pushed to the furthest extreme by the English courts. It looks like using the same idea as a defense against the plaintiff as was used by him against the defendant. It had all the appearances of fair play. But in fact it developed into the harshest defense the courts have ever recognized. An admitted wrongdoer

tions devoted to the subject. See § 207 et seq. There are also many then recent cases cited. Of more significance is the change of the whole attitude of these writers on the general defense of assumed risk. They say: "This principle is, that the exemption of masters from liability to servants, for injuries caused by defects which the servants knew or ought to have known, is founded solely upon the general law of contributory negligence. * * *" Id. § 208; also see §§ 177–180. Beach, Contributory Negligence (1885) recites the rule that a servant's contributory negligence is a bar to the servant's action, but the cases cited are all recent. See § 94 et seq.

[33] See Bohlen, Contributory Negligence (1908) 21 Harv. L. Rev. 233; Voluntary Assumption of Risk (1907) 20 Id. 14; Schofield, Theory of Contributory Negligence (1890) 3 Id. 263; Beach, op. cit. supra note 32, §§ 6, 8.

[34] See 3 Labatt, op. cit. supra note 24, § 1223 for indication of the confusion between the two defenses and for an attempt to discriminate them. See 17 Law Notes 206 (Am. 1914); also (1928) 37 Yale L. J. 831.

was completely absolved from his wrong at the expense of the injured party.

Closely bound up with the idea of assumed risk was the further idea of "proximate cause." It had never played a part in intentional harms.[35] The legal theory behind

[35] I do not overlook Vicars v. Wilcock, 8 East. 1 (1806) nor Ward v. Week, 7 Bing. 211 (1830), nor cases of that type which were dealing with the problem of limiting liability in intentional harms under the "natural and probable consequence" formula. See Bohlen, Contributory Negligence (1908) 21 Harv. L. Rev. 233; Beale, The Proximate Consequences of an Act (1920) 33 Id. 633. This formula was taking form somewhat earlier than the "proximate cause" formula in negligence cases. These formulas soon became so interwoven that they could no longer be easily identified, but that was later in the century. The first very serious suggestions in English cases I have found of the two ideas being thought of as one are Pollock's dicta in Rigby v. Hewitt, 5 Ex. 239, 249 (1850) and in Greenland v. Chaplin, 5 Ex. 243 (1850). Before this Greenleaf in his book on Evidence (2d Ed. 1848) § 256 had said: "The damage to be recovered must always be the natural and proximate consequence of the act complained of. This rule is laid down in regard to special damages, but it applies to all damages" (citing Sedgwick, Damages [1869] c. iii). Both Greenleaf and Sedgwick are cited for this proposition in several early cases. See Sedgwick, Damages (5th Ed. 1869). None of these cases and none of those relied on by these authors involve causation but are cases dealing with limitations upon responsibility in intentional hurts in tort cases or in breaches of contract, usually dealt with as special damages, or remote or consequential damages, all terms of very long standing. Sedgwick seems to have been the first to associate the two ideas. He says (Id. 56), evidently bringing forward an earlier statement: "• • • the law refuses to take into consideration any damages remotely resulting from the act complained of. This proposition, or one correlative to it is expressed in the maxim causa

trespass was too transparent to give much place to "causes." But when the negligence concept was developed, and the defense of contributory negligence arose, thus introducing multiple fault factors, it was inevitable that this partly philosophical, partly moral, attempt to trace out responsibility in terms of causes should receive great emphasis. Thus instead of "proximate cause" being a possible basis of contributory negligence as has been suggested,[36] it is the most extravagant development of that ruth-

proxima, etc." But on page 65 he says: "Mr. Greenleaf has said with more accuracy (quoting the sentence set out above from § 256)." The phrase struck the imagination of many courts. But clearly he was talking about the older problem, and not the one set up in Butterfield v. Forrester, supra note 20. The association of two ideas has seldom caused so much trouble.

[36] See Bohlen, op. cit. supra note 35. Professor Beale makes the statement in his article (op. cit. supra note 35, at p. 636) that "in very few cases up to the year 1900 is the proximity of the cause the subject of investigation." It is not clear what is meant by this statement. The "proximate cause" doctrine had raged throughout the 1800's after the rule in Butterfield v. Forrester, supra note 20, became the vogue. That case itself was not radical. It was a case of subsequent negligence on plaintiff's part, the exact converse of the Davies and Mann situation more than thirty years later. It was accepted for a broader principle which included concurrent negligence on part of plaintiff and defendant. This marks the normal danger of principles; they are always stated more broadly than the case or else a new one is required for each case. As a result of the broad principle of this case, courts began tracing out the results of the respective faults of both plaintiff and defendant. At first it was done mildly. In Flower v. Adams, 2 Taunt. 314 (1810), plaintiff's inability to handle his horse which was frightened by defendant's ashes, was held by Lawrence, J., "to be the immediate and proxi-

less defense. But it did not play much part in master-servant cases until contributory negligence had taken over many of the defensive grounds which had previously been recognized under assumed risk. Thus it was that as late as *Thomas v. Quartermaine*[37] Bowen, L. J., could express

mate cause." Then followed, Vennal v. Garner, 1 C. & M. Ex. 20 (1832); Hawkins v. Cooper, 8 C. & P. 473 (1838); Woolf v. Beard, 8 C. & P. 373 (1838); then came the stronger statement of Parke, B., in Bridge v. The Grand Junction Ry., 3 Mees. & W. 244, 248 (1838): "* * * if by ordinary care he might have avoided them, he is the author of his own wrong." This was repeated in Davies v. Mann, 10 Mees. & W. 546 (1842), and quoted in many subsequent cases. Smith v. Dobson, 3 Man. & G. 59 (1841) marked further emphasis, and so did Greenland v. Chaplin, 5 Ex. 243 (1850). By the time of Dowell v. Steam Navigation Co., 5 El. & Bl. 194 (1858), the use of "proximate cause" is well in the vocabulary. Among Chief Justice Campbell's many uses of the term is this: "If it (plaintiff's fault) was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained." Subsequent cases make great use of the term. See Tuff v. Warman, 2 C. B. (N. S.) 739 (1857); same case 5 C. B. (N. S.) 573 (1858); Witherley v. Regents Canal Co., 12 C. B. (N. S.) 2 (1862). In the meantime the term had become current in American opinions. American text writers during the last 25 years of the century indicate what a large part it played in legal theory. See Shearman & Redfield, Negligence (3d Ed. 1874) §§ 8–10, 33; Id. (4th Ed. 1888) cc. II, VI; Wharton, op. cit. supra note 32, c. III (Causal Relation), c. IX. (Contributory Negligence). It is doubtless a good guess that Wharton did more than any one else to disseminate this vicious doctrine in its most pernicious form. Beach, op. cit. supra note 32, §§ 10, 11. The doctrine had been elaborated in multitudes of cases during the century and had reached a most intricate development before its end.

[37] 18 Q. B. D. 685, 694 (1887).

the normal view of his century concerning the doctrine: "Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause." Thus could contributory fault be translated into "proximate cause." In this way the pain given by the contributory negligence defense was somewhat dissipated by an anaesthetizing phrase. What is more, the "last clear chance" limitation, itself a countervailing morality upon that of contributory negligence, but further accentuated the development of this least intelligible of all the doctrines of the negligence network.[38] Although "proximate cause" did nothing to extend responsibility, it proved one of the severest restrictions on imposing responsibility. It is mentioned here merely to call attention to the fact that to an already waterlogged morality theory of responsibility was added an additional deadweight of metaphysics. Nor was this enough. There still remained that defensive strand of vicariousness—imputed negligence[39]—to be woven into this steadily darkening legal theology.

But this multiple array of defensive moralities was too powerful and the courts quickly put limitations upon them.

[38] Davies v. Mann and subsequent cases cited in supra note 36.

[39] Thorogood v. Bryan, 8 C. B. 114 (1849); County Commissioners of Caroline County v. Beulah, 153 Md. 221, 138 A. 25 (Md. 1927); Brown v. Schendelman (Del. Super.) 143 A. 42 (1928); Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923). See excellent note (1926) 74 U. of Pa. L. Rev. 86.

The so-called nondelegable duties were the most important of these.[40] A servant did not assume the risks of his fellows' negligence if the master were negligent in employing competent fellow servants. Nor did a servant assume the risks due to poor rules and organization, dangerous surroundings and defective machinery, if the master was negligent in these particulars.[41] The master's duties under these heads seemed to take many directions, but they were in fact merely devices for escaping the drastic defenses which had been put into the hands of masters. And when in time these duties upon the master pressed too heavily against the basic morality of the defenses, the courts again put limits on them. The result was that the servant who entered upon his work or continued to work after knowing about the incompetency of his fellow servants, the inadequacy of the system of work, or the dangerous nature of the surroundings or the defective machinery, or any other failure of the master to perform his duties for the servant's protection, again encountered the defenses of assumed risk and contributory negligence—as best suited the dialectic of the occasion. In some cases, where the master promised to repair a defect, or there was an emergency of one sort or another, further refinements were made to save the injured servant, but it was hard for him to escape these twin-moralities of assumed risk and contributory fault. Also in constantly expanding industrial organizations it was not always easy to tell who were fellow serv-

[40] See 3 Labatt, op. cit. supra note 24, c. XXXV.
[41] See Huffcut, Agency (2d Ed. 1901) § 276.

ants. There were multitudes of employees of numerous ranks and classes. Obviously they could not all be treated on an equal footing. Many tests were required to make necessary distinctions: the vice principal doctrine, the departmental theory, the superior officer test, and the very important non-assignability of duty test. Every imaginable means of balancing the moral notions which dominated the negligence theory of the 1800's and setting off one against the other must have been resorted to. There is no way to exaggerate what actually took place. The only complex negligence doctrine which was rejected even in part was the "degrees of negligence" device which was given so large currency by Sir William Jones' little book on *Bailments* in the late 1700's.[42] It is hard to understand why so practical an adjustment as the "comparative negligence" suggestion fell by the way so quickly.[43] Probably it was due to the violent reaction against the

[42] Hinton v. Dibbin, 2 Q. B. 646, 661 (1842); Wells v. N. Y. Cent. R. Co., 24 N. Y. 181 (1862). See Shearman & Redfield, Negligence (3d Ed. 1874) c. II; (4th Ed. 1888) c. III. The terms "gross" and "wilful" negligence are constantly used, and serve a good purpose, as makeweights to avoid the effects of contributory negligence and in place of the "last clear chance" phraseology. They are used to extend the latter doctrine in jurisdictions which only purport to recognize the "discovered peril" branch of the doctrine. See my discussion, Contributory Negligence and Proximate Cause (1927) 6 N. C. L. Rev. 3, 26, 27. See excellent article by F. Green, High Care and Gross Negligence (1928) 23 Ill. L. Rev. 4.

[43] See cases cited in Ames & Smith, Cases on Torts (Pound's Ed. 1917) 267–268; Beach, op. cit. supra note 32, c. III, Comparative Negligence. See Pollock's remark in Greenland v. Chap-

difficulties of the "degrees of negligence" that this one rational idea of the whole mass of moral rules was rejected so peremptorily. Nineteenth century morality was a severe thing. It demanded absolutes. Either a defendant was responsible or he was not. Compromises were not to be endured. Nor could the courts bear to see so much legal theory swept aside by a simple device of apportioning the damages and that done by laymen. A moral century required the balancing of moral formulas at the hands of experts in morality. Let it suffice to say that legal theory based on the notions underlying assumption of risk, buttressed by the arguments of domestic economy, and chastity of conduct born of hardship, as set forth by Lord Abinger, could be and was spun indefinitely.

There is only one bright spot. Whenever a case for any reason broke through legal theory and reached the jury it was almost invariably decided against the master and for the servant. And what is more, the judges, both trial and appellate, found themselves so enmeshed in their theories that their only retreat in many cases was found in passing the matter to the jury. The superstructure of theory broke under its own weight. Verdicts were too constant and too overwhelming to be withstood except in the most haphazard fashion. And the jury probably rendered the most important of its scanty service to legal science in civil cases at this juncture. Seemingly, juries saw only the parties

lin, 5 Ex. 243 (1850). What the courts refused to undertake as impossible, they now do in nearly every state by virtue of some statute.

before them, and placed the risk where they thought it could best be borne. The judges had been interested in principles; juries were interested in doing justice between the parties. The judges evolved a nice scheme for determining responsibility, the juries gave verdicts which wrecked the scheme. Juries held their ground here until legal theory could catch up with the new order of things which had emerged under the very eyes of the judges without most of them noticing it. But these theories had been developed under severe difficulties and were not to be cast aside without protest, for judges and lawyers had found them fascinating to create and to work with. And what is more, they are still respectable.[44]

The first Employers' Liability Act was passed by Parliament in 1880. By a divided court this act was construed to relieve the servant only of the "fellow-servant" defense.[45] Bowen, L. J., said: "The true view in my opinion is that the Act * * * has placed the workman in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business." Both the defenses of assumption of risk and contributory negligence were otherwise left intact. In 1891 the House of Lords in *Smith v. Baker*[46]

[44] Moore v. Isenman, 127 Me. 370, 143 A. 462, 61 A. L. R. 898 (1928); Zuverino v. Boston & Maine R. Co., 101 Vt. 261, 143 A. 308 (1928); Flannery v. New York, O. & W. R. Co., 29 F.(2d) 18 (C. C. A. 2d, 1928); New York, C. & St. L. R. Co. v. May (Ind. App.) 164 N. E. 288 (1928).

[45] Thomas v. Quartermaine, 18 Q. B. D. 685 (1887).

[46] [1891] A. C. 325.

gave some relief against the defense of assumed risk when invoked to defeat the action of a servant who had continued to work after knowing the danger. But the full lesson taught by the cases of this class which had come before the court was not appreciated until the Workmen's Compensation Act of 1906.[47]

In America legislatures were contented with passing very restricted employers' liability acts applicable primarily to railroads, and even these were restricted in numerous particulars by the courts where they were allowed to stand at all.[48] In 1911 the early workmen's compensation act of the New York Legislature came before the New York Court of Appeals [49] and was held unconstitutional. While the court recognized that the defenses of contributory negligence and the fellow servant rule could be abolished by legislation, it denied the legislative power to make an em-

[47] Knowles, Law Relating to Workmen's Compensation (4th Ed. 1924).

[48] See Buford, Assumption of Risk Under the Federal Employers' Liability Act (1915) 28 Harv. L. Rev. 163; Second Employers' Liability Case, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (1912); (1928) 37 Yale L. J. 831. The Supreme Court still maintains a none too liberal attitude towards cases which might well be held to fall within the Employers' Liability Act. See Uradilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224 (1928); Kansas City So. R. Co. v. Jones, 276 U. S. 303, 48 S. Ct. 308, 72 L. Ed. 583 (1928).

[49] Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911).

ployer responsible for injury incurred without the fault of the employer. The court said:[50]

"When our constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law. * * * The argument that the risk to an employee should be borne by the employer because it is inherent in the employment may be economically sound; but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law."

This but indicates how deeply ingrained this idea of "fault" had become in the thought habits of judges. But they could not hold out. Industry had grown rich beyond belief. The risks of physical hurts could be distributed as well as could wages and other costs. Business no longer required protection against its workmen as did the household of Lord Abinger's century. The dangers incident to employment were such that the most intelligent and loyal service could not prevent them. On the other hand workmen had become even more dependent upon the mercy of avaricious industrialists who would not of their own accord provide the preventive safeguards which were within their command. It was now seen that the power of society was needed to compel employers to purge their con-

[50] Id., 201 N. Y. 293, 94 N. E. at page 439.

duct towards their employees rather than the reverse. Juries had already forced the courts to do for years what the Court of Appeals of New York held the legislature had no power to do. The idea of "fault" in any moral sense in these cases had become bankrupt. Justice between the injured workman and his employer had been forced into the picture and once it had made itself recognized it was found to be in full harmony with the economics of industry. Whether it be called a liberalized ethical notion of responsibility, or a responsibility compelled by giving heed to other factors than those of morality, a new order of things was at hand. And the administration of this new scheme demanded a different technic from that of the orthodox courts—a technic untrammelled by the theories of administration which have so successfully strangled the courts when faced with large developments as the employee emancipation.

LANDOWNER AND INTRUDER

The negligence network of legal theory has been hastily sketched as it developed in master-servant cases as a pattern by which to indicate other developments either mature or now under way. The possibilities are many but the briefest outlines must suffice. Again familiar subject matters are chosen.

Land has an indefinite extent upwards as well as downwards.[51] The owner may use his land as he pleases short

[51] 2 Bl. Comm. *18; see Ball, The Jural Nature of Land, 23 Ill. L. Rev. 45 (1928); The Vertical Extent of Ownership in Land (1928) 76 U. of Pa. L. Rev. 631.

of creating a nuisance.[52] Every entry thereon without the owner's leave is a trespass for which the owner may have his action.[53] The owner owes a trespasser no duty other than not to intentionally harm him.[54] No group of ideas has been harder set in the pronouncements of courts. Even the strong morality of the negligence theory has made slow progress against the landowner's preferential position. Assuming that by a process of "peaceful penetration" it has practically superseded the older concepts with reference to the uses made by a landowner of his property, negligence cannot yet wear its own garb. Unreasonable uses must still be spoken of and dealt with in terms of nuisance,[55] and intruders on land are classified into multiple

[52] Sic utere tuo ut alienum non laedas, 3 Bl. Comm. *217; Blythe v. Topham, 1 Roll. Abr. 88, Cro. Jac. 158 (1607). See Shearman & Redfield, Negligence (3d Ed. 1874) § 496.

[53] 3 Bl. Comm. *209; Dougherty v. Stepp, 18 N. C. 371 (1835).

[54] Ilott v. Wilkes, supra note 19; Buch v. Amory Mfg. Co., 69 N. H. 257, 44 A. 809, 76 Am. St. Rep. 163 (1898); Bohlen, Studies in the Law of Torts (1926) 156.

[55] Beecher v. Dull, 294 Pa. 17, 143 A. 498 (1928); (1929) 77 U. of Pa. L. Rev. 550; McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928). The court in the latter case says: "Nuisance as a concept of law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors (Heeg v. Licht, 80 N. Y. 579 [36 Am. Rep. 654]). One acts sometimes at one's peril." Id., 247 N. Y. 343, 160 N. E. at page 391.

It could be said as easily that it is unreasonable (negligent) to act at all in such cases. This is the position taken by Jeremiah Smith in the blasting cases. See Smith, Liability for Substantial Physical Damage to Land by Blasting (1920) 33 Harv. L. Rev. 542, 549; Selected Essays on The Law of Torts (1924) 614, 621, 633. See also 1 Thompson, Negligence (1901) § 675.

useless and confusing categories.[56] But the question now has come to be, not whether the negligence process should be recognized as controlling the landowner, but whether he should not be controlled, in many instances at least, by even a more rational process for imposing responsibility.

The most striking instance of this class of cases is probably found in the case of intrusions made by young children upon the premises of industrial landowners. The

[56] The numerous categories of persons who may go upon land, ranging from a naked trespasser to a business guest, are of relatively recent origin, having developed simultaneously with the negligence theory of responsibility as a whole. They were invented to make the negligence concept more adaptable to the landowner's control. See Shearman & Redfield, Negligence (3d Ed. 1874) c. XXVIII. The courts took over the trespass idea, a moral notion employed since the earliest developments of the common law, and made it serve the purpose of a stem on which to graft this whole new scheme of categories. The negligence formula of reasonable care was slow in taking form; it was vague at best. When applied to the infinite situations of the landowner towards persons coming on his land, it seemed to place far more power in the hands of a jury than the judges of the middle 1800's were willing to pass over to them. The expression of Pollock, C. B., in Hardcastle v. South Yorkshire Ry., 4 Hurl. & N. 67 (1859) reflects what was said both before and after in these cases: "We do not see where the liability is to stop * * * it would be very dangerous * * * if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous." No one can read these cases without feeling the strong fear that landowners must be protected from juries. See Binks v. The South Yorkshire Ry. and River Dun Co., 3 Best. & S. 242 (1862); Hounsel v. Smyth, 7 C. B. (N. S.) 729 (1860); Southcote v. Stanley, 1 Hurl. & N. 247 (1856); Bolch v. Smith, 7 Hurl. & N. 736 (1862) (no duty to licensee as to obvious danger); Gautret v. Egerton, L. R. 2 C.

trespasser rule has had its bloodiest toll at this point.[57] The landowner's responsibility was denied first because the intruder himself was a wrongdoer and there was no duty owed him, and in the absence of duty the idea of

P. 371 (1867). Even as strong a case as Barnes v. Ward, 9 C. B. 392 (1850) gave the judges a great deal of trouble.

In this formative period of negligence theory judges found that by classifying the persons into various classes they could more effectually control the power of the jury. The more classes, the more necessity of defining those classes, the more "duties" to be determined (the duty concept is the judge's contrivance through which to exercise his power), and thus the fewer cases to be sent to a jury, and the more binding the instructions which accompanied the cases which were sent. It was thus an administrative device. But the results are distressing. These nice grades of persons represent the same idea as the degrees of negligence which were also based on classification of persons. They are more difficult because there are more of them and they are more deceptive in appearance. Except in the easy cases, in which no classification is needed in order to pass judgment, it is harder to determine what class the person falls in than it is to decide the case. If courts generally recognized the fact that it was perfectly legitimate for them to classify the person according to the judgment they desired to reach, I should find little criticism of the scheme. But frequently they wrestle so hard in getting their person into the desired classification that not only are their own judgments clouded, but others who would rely on such judgments for guidance come also to take them seriously. For illustration see Sweeny v. Old Colony R. R., 10 Allen (Mass.) 368, 87 Am. Dec. 644 (1865); Brigman v. Fiske-Carter Construction Co., 192 N. C. 791, 136 S. E. 125, 49 A. L. R. 773 (1926). The trouble with such classification is that it seems to make judgment depend upon one factor alone, and this is wholly misleading. There are numerous factors found in nearly all of these cases, such as the

See note 57 on following page.

negligence was beside the point.[58] A majority of courts conceded this ground but met it with a like moral argument. They said that the landowner who places dangerous and attractive machinery on his land thereby tempts young children, and his temptations amount to invitations

nature of the premises, the extent of the danger, the age of the person, his physical capacity, his intelligence generally and his acquaintance with the particular situation, the occasion for his visit, and many others. The cases themselves reflect the monstrous results, both in legal theory and protection afforded particular persons, growing out of the attempt to focus judgment on the one factor of whether the intruder was a trespasser, licensee, invitee, business guest or some one of the sub-classes under each of these. Probably the most horrible example of how the device operates is found in the recent English case of Robert Addie & Son v. Dumbreck, 45 T. L. R. 267 (1929). See Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N. E. 162, 60 A. L. R. 353 (1928), for strange use of "doctrine of invitation."

[57] Smith, Liability of Landowners to Children Entering Without Permission (1898) 11 Harv. L. Rev. 349, 434; Selected Essays on The Law of Torts (1924) 357; Hudson, Turntable Cases in the Federal Courts (1923) 36 Harv. L. Rev. 827; Selected Essays on The Law of Torts (1924) 397. See lists of cases at the conclusions of these articles. See also many other articles cited in Wilson, Cases on Torts (1928) 543.

[58] Buch v. Amory Mfg. Co., supra note 54; Delaware L. & W. R. R. v. Reich, 61 N. J. Law 635, 40 A. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727 (1898); Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481 (1901); Cox v. Alabama Water Co., 216 Ala. 35, 112 So. 352, 53 A. L. R. 1336 (1927); Dobbins v. Missouri, K. & T. Ry. Co., 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856 (1897); Kaproli v. Central R. of New Jersey (N. J.) 143 A. 343, 60 A. L. R. 1430 (1928).

and having invited them into his traps,[59] he himself is a wrongdoer and hence responsible. They met the wrongful trespass of the child with a temptation by the landowner, and made the tempter pay the bill.[60] This was no small theological feat. It is employing one morality to defeat another as is involved in defeating contributory negligence by "wilful" negligence.[61] But it was an unnecessary method of reaching a good result,[62] except for the fact that the judges thought it necessary under their accepted theory. But the medieval domestic establishment

[59] Keffe v. Milwaukee & St. P. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393 (1875).

[60] It is interesting to observe the seriousness with which the opponents of the doctrine argued against this point. See Smith's article, supra note 57; Selected Essays on the Law of Torts (1924) 360–368.

[61] Aiken v. Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238 (1903); (1928) 17 Cal. L. Rev. 65.

[62] Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745 (1873). In this leading case the court stated the doctrine with the utmost clarity. Defendant was negligent, plaintiff was too young to be contributorily negligent. The sinful plight of a trespasser upon land did not occur to the court. That was a ghost from the centuries past reincarnated in later cases. The court assumed the duty, i. e., that the negligence theory would apply to a landowner's use of his land as it does to the use of any other sort of property. Note also the good sense of Cooke v. Midland Great Western Ry., [1909] A. C. 229. The present method of rationalizing these cases is most inadequate. See United Zinc & Chemical Co. v. Britt, 258 U. S. 268, 42 S. Ct. 299, 66 L. Ed. 615, 36 A. L. R. 28 (1921); Darsch v. Brown, 332 Ill. 592, 164 N. E. 177 (Ill. 1928). Note the extreme position taken by one jurisdiction. Erie R. Co. v. Hilt, 247 U. S. 97, 38 S. Ct. 435, 62 L. Ed. 1003 (1918).

with its yards and meadows, cultivated area and wild pasture, with its rock piles and fences, its brooks and decayed trees, is an entirely different sort of enterprise from that of a railway yard, a steam mill, a factory, a power system, a supply depot, an explosive storehouse, an abandoned plant, or many other such premises. It is different in drawing power for curious children, in the number and seriousness of the risks to which children are subjected, in the relative capacity of the landowner and parents to protect his premises from intrusion by means of fences, gates, guards, or otherwise, and it is different in that the costs of affording such protection can be cared for as part of the costs of the enterprise, and more than all, it is different in that the risk when it results in hurt to the child can best be borne and absorbed by this type of landowner. To these may be added the now accepted recognition that children are responsibilities of the community as a whole. Every consideration of economics, of ethics, of prevention, and of justice would all place a severe duty upon the landowner in such cases. And inasmuch as contributory negligence is seldom a factor in these cases, and the question of reasonableness is normally one for the jury, with the almost certain result that the defendant will be required to pay, the difficulties of administering these cases through the orthodox judicial process required for negligence cases would overwhelmingly demand that they be placed upon some basis of insurance similar to the workmen's compensation device. There is no rational basis to be found for continuing to handle the problems created by the industrialist landowner in the same manner as those created

by the farmer and small tradesman. The assumption (stated in the decisions as a principle) which runs through hundreds of these cases that all landowners are to be subjected to the same responsibility is not necessary, nor is it well founded. There is no legal theory so flexible that its results will not be used against itself if it is made to care for such widely variant cases.

A somewhat similar development has taken place with reference to adults—those who walk on railway tracks or go upon the premises of industrial plants. Probably it is not startlingly immoral for persons to choose the smooth and dry roadbeds rather than the muddy streets of the outlying districts of large communities. Nor is it particularly sinful for people to satisfy their curiosities by entering and observing the operations of industrial plants. That these persons annoy and impose responsibilities upon the owner of such enterprises, even if only to keep intruders off the premises, is readily conceded. Nevertheless these curious intruders are found in increasing numbers invading these dangerous premises. And they are trespassers, or tolerated intruders at best, until a court invests them with the rights and privileges of licensees in order that the harshness of the earlier rules may be obviated. Many courts insist that railway operatives are under a duty to keep a lookout for such persons, that other landowners must warn or protect them from hidden dangers, and must refrain from negligent action while such persons are present. The costs cast upon industry to furnish this somewhat "bootleg" protection to unwelcome "guests" is after all not crushing. It is true that neither morals

nor justice make a strong demand here in all cases. But the desirability of requiring the operators of the engines of traffic and the machines of industry to be highly regardful of human life, wherever it is encountered, and the ability of the owners and operatives to reduce the risks of hurt even as to those who insist upon subjecting themselves to such risks, is sufficient to warrant judgment for plaintiffs in many of these cases. The creative power of the courts to raise an intruder from the category of a trespasser to that of an invitee affords a basis for finding a duty in terms of negligence theory. The power of judges to work such miracles has always been beyond the understanding of those who would insist upon the sanctity of principles. But somehow or other judges come to recognize the habits of their fellow beings as reflected in constantly recurring tragic experiences, and to bend both principles and judgment to take them into account, long before the judges overcome their own habits of talking about such matters in the refined categories of "fault." Their judgments are years in advance of their language. Why continue to insist that there is no gulf between the thought and its expression? The judicial process does not require either the confusion or the bad habits resulting from carrying along these phrases which misrepresent everything that is being done. The normal negligence formula of "reasonable care under all the circumstances" was designed for just these cases in which judgment must have the widest range and in which uniformity, except in process, is impossible. The interests of the landowner would be protected under this formula equally as well as the in-

terests of other persons, and he deserves nothing more. Both judge and jury have the same power under it as they have under the cumbersome categories used for classifying intruders, and much greater facility for exercising their power rationally.[63]

[63] There are many cases which fall into this group. The courts generally class the intruder as a trespasser or as a licensee or invitee as they desire to bless or damn him. Now and then a court deals with a case without resorting to these categories. See Southern R. Co. v. Cochran, 29 F.(2d) 206 (C. C. A. 5th, 1928); Lyman v. Hall, 117 Neb. 140, 219 N. W. 902 (1928); McGlone v. William Angus, Inc., 248 N. Y. 197, 161 N. E. 469 (1928). But this is the exception. Norris v. Hugh Nawn Contracting Co., 206 Mass. 58, 91 N. E. 886, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 424 (1910); Castonguay v. Acme Knitting Machine & Needle Co., 83 N. H. 1, 136 A. 702 (1927); Moore v. Ohio Oil Co., 241 Ill. App. 388 (1926); Loney v. Laramie Auto Co., 36 Wyo. 339, 255 P. 350, 53 A. L. R. 73 (1927); Roper v. Commercial Fibre Co. of America (N. J. Sup.) 143 A. 741 (N. J. 1928); Pryotely v. New York, C. & St. L. R. Co., 28 F.(2d) 868 (C. C. A. 6th, 1928); Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 A. 440, 56 A. L. R. 1011 (1927); (1928) 12 Minn. L. Rev. 420; Mallory v. Day Carpet & Furniture Co., 245 Ill. App. 465 (1927); Teakle v. San Pedro, L. A. & S. L. R. Co., 32 Utah 276, 90 P. 402, 10 L. R. A. (N. S.) 486 (1906); Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P. 689, 16 Ann. Cas. 229 (1908); Farmers' & Merchants' Warehouse Co. v. Perry, 218 Ala. 223, 118 So. 406 (1928); Anderson v. Androscoggin Pulp Co., 126 Me. 5, 135 A. 249 (1926); Kinsman v. Barton & Co., 141 Wash. 311, 251 P. 563 (1926); Douglas v. Bergland, 216 Mich. 380, 185 N. W. 819, 20 A. L. R. 197 (1921); Brigman v. Fiske-Carter Construction Co., 192 N. C. 791, 126 S. E. 125, 49 A. L. R. 773 (1926); Southern R. Co. v. Matthews, 29 F.(2d) 52 (C. C. A. 6th, 1928); Terre Haute, Indianapolis & Eastern Traction Co. v. Ferrell (Ind. App.) 164 N. E. 307 (1928);

CROSSING CASES

The "Stop, Look and Listen" alliteration of three generations ago is still taken seriously. Contributory negligence continues to be a vigorous defense in these cases. The rules as to crossings grew up when travel was both slight and slow, when railroads were daring economic ventures, and when pioneer morality not only insisted that every man look out for himself, but when a traveler had some assurance that by looking out for himself he could protect himself. Today railroads maintain multiple tracks. They have multiplied the number of trains they run and have increased their speed. The public highways they intersect are crowded with fast moving traffic. In economic importance the gap between the highway and the railway has closed. The railway exercises a public franchise for private profit, while the highway is built and maintained at public cost for public use. The railway can protect the hordes of travelers by guards or passes at less cost and with more effect than travellers can protect themselves. The risks have increased both in number and in degree, but the railway has now grown rich. It is both able to protect against these risks and to distribute the loss when the protection fails. Every factor which determines judgment would seem to require that such risks should be eliminated altogether, but if any there should be,

Richardson v. Whittier, 265 Mass. 478, 164 N. E. 384 (1929); Smith v. Twin State Gas & Electric Co., 83 N. H. 439, 144 A. 57, 783, 61 A. L. R. 1015 (1928). See exhaustive comment, (1929) 77 U. of Pa. L. Rev. 506.

they should be placed upon the railway. The refined morals of negligence with its judge and jury process have no place here. Courts are constantly deciding these cases by harking back to a day when life was ordered on an entirely different scale and when a stiff morality assumed to hold a dominant place in the administration of law. Current legal theory at this point is wholly inadequate. The orthodox judicial process should be relieved of the bulk of this litigation.[64]

[64] As I write this note the newspapers report a crossing accident at Bellevue, Ohio, in which seventeen passengers of a bus were killed and others injured. Two years ago almost the entire football squad of Baylor University were killed in such an accident near Austin, Texas. Busses loaded with school children are not infrequently in such collisions. The toll of dead and injured mounts into the thousands annually.

The crossing problem was given great emphasis by the reversion to early type decision shown in Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645 (1927). See (1928) 16 Cal. L. Rev. 238; also extended note (1926) 41 A. L. R. 405. For exhaustive comments, see 43 Harvard Law Rev. 926 (1930); 8 N. C. L. Rev. 293 (1930). The decision itself is very narrow, but even so, it points in the wrong direction. I understand that railroad companies posted and bulletined the opinion far and wide. Most jurisdictions fortunately have gone so far beyond the spirit of this case that they will not be greatly influenced by it. But judging from the numerous citations and discussions this decision has received it will probably work an over-cautiousness in many state courts and especially so in the federal courts. The courts have never dallied quite so much with a serious problem which was at the same time so easy of solution. The following are only a few of the current cases: Greenwald v. Baltimore & Ohio R. Co., 332 Ill. 627, 164 N. E. 142 (1928); Roseneranz v. Michigan Cent. R.

AUTOMOBILE CASES

Probably the general traffic cases—pedestrian and motorist, motorist and motorist—furnish by far the largest number of cases of the current day.[65] And doubtless also

Co., 244 Mich. 137, 221 N. W. 273 (1928); Pennsylvania R. Co. v. Stegaman, 22 F.(2d) 69 (C. C. A. 6th, 1927); Jones v. Boston & M. R. R., 83 N. H. 73, 139 A. 214 (1927); Buck v. Rutland R. Co., 101 Vt. 282, 143 A. 297 (1928); Haskins v. Pennsylvania R. Co., 293 Pa. 537, 143 A. 192 (1928); Grand Trunk Western R. Co. v. Cather (Ind. App.) 163 N. E. 622 (1928); Auvil v. Western Maryland R. Co., 19 F.(2d) 30 (C. C. A. 4th, 1927); Illinois Cent. R. Co. v. Leichner, 19 F.(2d) 118 (C. C. A. 5th, 1927); Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N. W. 692 (1928); Germak v. Florida East Coast R. Co., 95 Fla. 991, 117 So. 391 (1928); Sertich v. Baltimore & O. R. Co., 29 F.(2d) 112 (C. C. A. 4th, 1928). When the legislature seeks to minimize contributory negligence the courts are sometimes so thoroughly indoctrinated with the "fault" theory that the legislation amounts to little. Western & A. R. R. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929); Gray v. Missouri Pac. R. Co., 23 F.(2d) 190 (C. C. A. 6th, 1928). But see Tennessee Cent. R. Co. v. Page, 153 Tenn. 84, 282 S. W. 376 (1926); Southern R. Co. v. Johnson (Va.) 143 S. W. 887 (1928).

Even though courts take a most liberal attitude towards persons injured at crossings, the negligence theory is wholly inadequate to cope with the situation. The situation demands such stringency as to eliminate the risk. Norfolk & W. R. Co. v. Holbrook, 27 F.(2d) 326 (C. C. A. 6th, 1928); Lawson v. Minneapolis, St. P. & S. S. M. R. Co., 174 Minn. 404, 219 N. W. 554 (1928).

[65] Report of Calendar Committee, N. Y. L. J., June 23, 1927. See excellent article of Marx, Compulsory Compensation Insurance (1925) 25 Col. Law Rev. 164.

legal theory is here most out of joint. This is true despite the fact that insurance companies are constantly absorbing the overwhelming amount of these losses without suit, and in the face of the further fact that jury verdicts are little short of unanimity for the injured party. Ordinarily it is the most dubious case, either on negligence itself or on the legitimacy of the claim, that reaches the courthouse. The courts find themselves struggling hopelessly under this mass of cases. The licenses required for driver and car, speed laws, lights and brakes, rules of the road, traffic cautions and signals, together with an enormous increase of traffic officers do not appreciably cut down the number of injuries, the risks, or the work of the courts. As though there were no other way to do the job, the courts continue to inquire into the "fault" of the respective parties.[66] In quantity of litigation, and also in

[66] The following are merely typical of the cases reported in the current reports: Woolner v. Perry, 265 Mass. 74, 163 N. E. 750 (1928); Johnson v. Boston & M. R. R., 83 N. H. 350, 143 A. 516, 61 A. L. R. 1178 (1928); Cole v. Wilson, 127 Me. 316, 143 A. 178 (1928); Brotman v. Doan (N. J.) 143 A. 328 (1928); Harber v. Graham (N. J.) 143 A. 340, 61 A. L. R. 1232 (1928); Coombs v. Mackley, 127 Me. 335, 143 A. 261 (1928); Galvin v. Kreider, 293 Pa. 395, 143 A. 110 (1928); Jackson v. Parish (Tex. Civ. App.) 4 S.W.(2d) 87 (1927); Gaboury v. Tisdell, 261 Mass. 147, 158 N. E. 348 (1927); Bowman v. Stouman, 292 Pa. 293, 141 A. 41 (1928); Village of Newburgh Heights v. Vanek, 29 Ohio App. 517, 163 N. E. 721 (1928); Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A. L. R. 943 (1928); Blanos v. Kulesva, 107 Conn. 476, 141 A. 106 (1928); Coca-Cola Bottling Co. v. Shipp, 174 Ark. 130, 297 S. W. 856 (Ark. 1927); Baker v. Hurwitch, 265 Mass. 360, 164 N.

the legal theories applicable to the particular case, traffic litigation is reaching totals far in excess of the enormous master-servant litigation of a generation ago.

But whatever the price, we have given over our ways to the motor vehicle, although the last one of us may become its victim. There can be no recessional. All the protective devices we shall design will not be enough. The "family purpose" [67] and "joint enterprise" [68] doctrines

E. 87 (1928). See five such cases reported from one sitting of the Supreme Court of Errors of Connecticut, 108 Conn. 505, 544, 560, 598, 602, 143 A. 881, 884–888 (1928).

[67] Goss v. Williams, 196 N. C. 213, 145 S. E. 169, 172 (1928). The following excerpt from the opinion indicates how much more good sense there is in talking in terms other than rules: "The question (family purpose doctrine) is for the first time presented to this court. The common law is elastic to meet the complex problems of the age as they arise, but courts should be slow and not enter the realm of legislation. Last year 22,160 people were killed in automobile accidents on the highways of the United States. In North Carolina, the last year, 571 were killed. During the first six months of this year 262 people in North Carolina were killed in automobile accidents, or an average of about 1½ a day, while an additional 2,088 were injured. The state total of motor cars on August 1, 1928, was 440,258. Passenger cars numbered 396,295; trucks 43,963. State average, one motor car to every 6.6 inhabitants.

"Human life is too cheap and restraint is necessary. The numbers killed and crippled each year are appalling. It is necessary, in reason, for the courts to hold the owners of automobiles, when they turn over an instrumentality of this kind to the family for family use, to strict accountability. This is one of the means to safeguard the public. The head is usually the one of financial responsibility, at least he is the owner of the instru-

[68] See Note 48 A. L. R. 1078 (1927).

help some but they do not go far. Too many people will continue to be hurt and subjected to serious risk without adequate protection. What court or group of laymen can so weigh faults as to pass with any precision upon the conduct of two swiftly moving automobiles, or two human beings equally bent on getting every second out of the day? And what difference does it make if they could? The motorist has chosen to make the streets unsafe. He is the one who gets the advantages from subjecting the pedestrian to perils. He can protect himself from financial hurt by a pittance, and as against the pedestrian at least, he runs little risk of suffering hurt either to his person or property. His ability to afford the advantages of a motor implies a like ability to supply protection against its hurts. In short, he imposes the risk, why should he not bear the loss when it comes? Justice is at her best here. And the case of motorist and motorist is little different. While justice is probably neutral as between these, the demands of a workaday world supply equally as severe exactions. The same economy is involved in compensat-

mentality. Upon the principles cited, consonant with natural justice, he should be held responsible."

Much faster headway with much less confusion would doubtless have resulted had the courts in earlier cases dealing with this problem faced it with more frankness instead of wasting so much time debating tenuous legal theories. See Lattin, Vicarious Liability and the Family Automobile (1928) 26 Mich. L. Rev. 846; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293 (1918); In re Opinion of the Justices, 251 Mass. 569, 594, 147 N. E. 681, 693 (1925). But see Smith v. Callahan (Del.) 144 A. 46, 64 A. L. R. 830 (1929) for an opinion which insists upon the integrity of legal rules.

ing the hurt individual who either supports a family or is supported by some one who does as is involved in the employer-employee cases. Insurance is the best available protection we have against the inevitable. The hurts and injuries of a motorized society are largely of that type. Morality, economy, and justice would all require the person who creates hazards on a large scale to avail himself of the protection insurance gives in behalf of his victims. And of equal importance, the administration of these cases would require that the judges of orthodox courts be rid of this litigation by machinery of simpler design. No rational opinion would require courts with their delicately poised theories of negligence to stagger under these increasing burdens any longer than the time required to fashion legislation to care for them.[69] In this class of

[69] See Elsbree and Roberts, Compulsory Insurance Against Motor Vehicle Accidents (1928) 76 U. of Pa. L. Rev. 690; Lohman, Compulsory Automobile Insurance (1927) 130; The Annals of the Am. Academy of Pol. & Social Sci. 163.

The following is an excerpt taken from a New York Times report (Sunday Jan. 27, 1929) of a speech made by A. B. Barker, manager, transportation department, Chamber of Commerce of the United States:

For these three groups of percentages of increases in automobile fatalities between 1920 and 1927 are:

North Atlantic States (Maine to Maryland, inclusive):

Increase in automobile registrations	176%
Increase in fatalities	74%

Middle Western States (Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Missouri, Kansas and Nebraska):

Increase in automobile registrations	157%
Increase in fatalities	134%

negligence cases, as in those already discussed and others not discussed, it would seem that the duty problem has been determined so definitely and responsibility has been indicated so decisively through years of litigation, that nothing is left to be done which cannot be better performed by some less ponderous agency than an orthodox court. The expense item alone that comes from choking the judicial process with these cases is literally incalculable.

FUNCTIONS OF THE JUDICIAL PROCESS

The judicial process in negligence cases is not greatly dissimilar from the judicial process in other cases. But negligence cases have afforded the process its greatest flexibility. It is extensive in these cases because of the machinery required in making use of a jury, and more so because negligence cases concern more largely the infinite variety of workaday contacts involved in the operation and development of the machines of industry and commerce. The judicial process in negligence cases is the experimental machinery of government-by-judges through which a restless and changing industrial society is furnished protection against its self-inflicted physical hurts. Only a few of the implications of such a conclusion can be stated here.

The most important, and the one most overlooked, is that "negligence" is a short term for a complex situation.

Southern States (Virginia, North and South Carolina, Kentucky, Tennessee, Mississippi and Louisiana):
Increase in automobile registrations..... 210%
Increase in fatalities..... 259%

There is some talk about a "tort of negligence." This can only be intended in a catchword sense. Government furnishes for use in the infinite variety of cases classed as "negligent," (and that only after the hurt has been received), a process consisting of judge and jury, plus "ready to wear" formulas for ascertaining the judgment of judge and jury, as a means of adjusting the loss. Another way of saying the same thing is that judge and jury with their paraphernalia are furnished as a means for determining the defendant's responsibility and assessing the damages. I have already outlined somewhat how the process works. Its first step involves a determination of "duties" by the judge—an alteration of some general formula to fit the particular case—and it is about this phase of the process that legal theories are thickest. Judges have stated many rules in an attempt to make the determination of "duties" easier.

In the course of any period of economic activity during which litigation increases greatly, current legal rules and theories reach the breaking point at many places. The requirements of business, ethical standards, the available safeguards, the relative capacity of parties to bear the risk involved, the exigencies of administration, or one or more of these factors, invariably changes. Thus the rules and theories which courts devise at one stage fall out of joint at succeeding stages. It is a habit of long standing to think of the rules and theories developed by courts as involving "principles" to which adherence must be given at all costs. Human nature is so constituted that it normally insists on standing by its "principles." Here are found

serious difficulties of readjustment and realignment. As a matter of fact, so far as rules of law are concerned these "principles" are nothing more than the generalizations (assumptions) drawn from the factors which determined the initial judgment; the hypotheses upon which a theory of responsibility was based. And these factors having changed, the initial judgment should no longer stand. "Principles" should therefore be expected to vary as do the factors which support them, but as a matter of fact they lag far behind. Usually they are never again in alignment after the first judgment.

In contrast, the other parts of the judicial process—the judge and jury—newly set up with each new case, permit the widest latitude in passing judgment with reference to the factors which at any particular time and place may then appear to be relevant. *Too little attention has been paid to these parts of the process.* They are of greater importance than rules and formulas, and no statement of rules made without reference to the purpose they are to perform can be of any value. In fact it has been assumed that these variables (judge and jury) could and should also be stabilized by rules and formulas. It is thus that such tremendous emphasis has come to be placed on rules and formulas as stabilizing factors. But it ought to be obvious that a process designed for adaptability cannot and should not, either in operation or in results, be subjected to any high standardization. And here lies the chief mistake of those who have worked so assiduously to standardize the "law of negligence." The process in negligence cases, of all the patterns of the judicial process, is

least fixed and most flexible. Judge, jury, and formulas which go to make up the process may react differently in every case. The process is highly individualistic, highly elastic. It allows the widest latitude for judgment. No aggregate of scholars or judges or practitioners can anticipate its judgment with assurance in a single complex case. Each case is new to it and must be subjected to it for a fresh judgment. It is slow and tedious. It is not designed to carry the heavy burdens of the types of cases for which responsibility has been developed through it. It only operates efficiently so long as a solution is being pondered. When society has made up its mind and insists upon quantity production—something automatic and uniform, something simple and "fool proof"—the high individualism of the judicial process in negligence cases will prevent its meeting these demands. Here the stage of experiment has passed and a standardized machinery which gives dependable results without exacting too much judgment is required. This is the stage for highly specialized courts,[70] for workmen's compensation, inspection,

[70] The traffic courts in most cities are not much more than collection agencies. The penalties imposed are highly uniform, and it is only the most exceptional case that is subjected to the judicial process in the sense of trial. The same tendency is marked in the courts of congested centers with reference to the prohibition cases. The handling of uncontested divorce cases is of the same character. It must be, when a single judge, as one Houston, Texas, judge did, may grant in excess of 200 divorces in a single day. Even the more conservative Connecticut courts denied divorces in only 28 out of 1554 such cases during a two-year period. There are other similar classes of cases. See Clark, Fact Research in Law Administration (1928) 2 Conn. Bar J. 211.

licenses, commissions and other so-called administrative devices. The slowness with which intelligent opinion accepts these instrumentalities can only be understood by recalling how bitterly at every step the hand and muscle workers generally have fought the advent of labor saving machinery. It is widely assumed that these administrative agencies are in some way set up in opposition to the courts, and thus they have frequently drawn the fire of the courts themselves. As a matter of fact they are designed to relieve the courts of work that they should not be expected to do, are not equipped to do, and are not needed to do. It is enough for the courts to keep these agencies acting within reasonable bounds. As a matter of fact a workmen's compensation or similar board is much like a specialized jury, but one that does not require the close watch and superintendence required by a common law jury. As here suggested, such an agency would be a specialized assessor of damages. The courts would continue to exercise the power of supervision as to important questions which still should be subjected to the judicial process for solution, but would be relieved of the mass of minutiae which so quickly clog the judicial process and prevent it from performing the important functions for which it was set up.

But it is not always necessary that courts await legislation to relieve them of the glut of cases which their own process has brought upon them. Judges may gauge their power within limits from the most drastic to the other extreme. They have often reduced litigation to the vanishing point. Rules and formulas and doctrines are seldom

designed as controls of judicial behavior, but are the means for judges to employ in their control of the conduct of others. That judges are controlled somewhat by the rules, formulas and doctrines which they use is of course as inevitable as that any one is influenced by his environment. But judges are expected, as are other persons, to be able to maintain a fair domination of their surroundings, and in the main they do so. Judges were not helpless in reducing to a simple basis the responsibility of the keeper of wild animals for the hurts done by them. The protection of property from the invasion of domestic animals was likewise made decisive. Courts of the western and southern states completely reversed the common law theory requiring the owners of cattle to fence them in. The extreme use of power in *Rylands v. Fletcher* was not as misguided as sometimes thought.[71] The practical elimination of the

[71] See Green v. General Petroleum Corporation, 205 Cal. 328, 270 P. 952, 60 A. L. R. 475 (1928) in which an oil company was held responsible to adjacent land owner for damages done to his property by blowing out of oil well which was being drilled with all due care. It is most misleading to think of these cases as accurately described by the catchphrase "absolute liability." The attitude of the California court is a good example. It had repudiated this "doctrine" in the dam cases. Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766 (1920). See Green v. General Petroleum Corporation (Cal. App.) 262 P. 377 (1928). The economic factors were aligned differently in California in 1920 than they were in England in 1860. But when the Green case came along, the court properly ignored the commitment it had made doctrinally and decided the case on a broader basis. The dangers of doctrines are not always so easily escaped. The at-

passenger-railway damage suit was a result of equally severe use of power.[72] The negligence *per se* device in

tempt made by the court to keep its legal theory intact and its resort to the "sic utere," etc., maxim, are most interesting.

A somewhat similar situation is involved where both the railroad and farmer have permitted the right of way and farm respectively to grow up in grass. Sparks from a well-equipped and operated engine set fire to the grass on the right-of-way and the farmer's property is burned. See Kellogg v. Chicago & N. W. Ry. Co., 26 Wis. 223, 7 Am. Rep. 69 (1870); cases cited in Bohlen, Cases on Torts (2d Ed. 1925) 506. The courts say "the doctrine of contributory negligence is entirely out of place here." Leroy Fibre Co. v. Chicago, M. & St. P. R. Co., 232 U. S. 340, 34 S. Ct. 415, 58 L. Ed. 613 (1914). But why so? Do not the courts mean that the economic and justice factors are so strong in these cases that there is no place for matching moralities (faults)? Does this mean that the same conclusions must be reached in such cases at other times and under other conditions? Would the same rule be applied between farmers owning adjacent farms?

A gasoline filling station may be a nuisance in every sense of that word except in the court's judgment. It may reduce the value of adjoining property, create fire hazards, turn a quiet corner into a noisy one to the aggravation of the whole neighborhood, increase the dangers from traffic to the neighborhood children, but to a world which uses automobiles, filling stations are indispensable. Brown v. Easterday, 110 Neb. 729, 194 N. W. 798 (1923); Powell v. Craig, 113 Ohio St. 245, 148 N. E. 607 (1925); Hanes v. Carolina Cadillac Co., 176 N. C. 350, 97 S. E. 162 (1918); cf. Carney v. Penn. Oil Co., 291 Pa. 371, 140 A. 133 (1928). Pure business practicalities have the right-of-way in many such groups of cases. Burke v. Hollinger, 296 Pa. 510, 146 A. 115 (1929).

The same sort of problem is inevitable in determining the aviator's liability. See Lee, Law Memoranda upon Civil Aeronautics (U. S. Printing Office 1928) 89 et seq.

[72] See supra note 3.

cases involving violations of police regulations tends in the same direction and would be efficacious were it not too drastic for many cases, and were it not possible under the doctrine of contributory negligence and proximate cause to use it just as effectively to defeat the very purpose for which it is designed. Slander *per se* and libel *per se* save many extended inquiries. The "innocent misrepresentation" doctrine serves a similar purpose in facilitating the administration of deceit cases.[73] There are other instances doubtless more significant. Whenever judges have felt that the stage of experimenting has passed and certain adjustments are desirable, they have seldom hesitated to employ their power to such ends.

Probably after all, a vocabulary of absorbent phrases which defy rational analysis enables them to exercise this power all the more frictionlessly. But I disclaim for them any purposeful vagueness. I rather believe that most judges feel themselves bound by what they choose to think a technic of long development, and they feel they must be able to translate the factors which are here sought to be identified into such technic before they can conscientiously consider them in passing judgment. They are thus not infrequently impelled to surrender their power of passing judgment to what appear to be the exigencies of their legal theory. That there are other judges who have expanded the bonds of any such technic

[73] See Miller, Innocent Misrepresentation as the Basis of an Action for Deceit (1928) 6 Tex. L. Rev. 151; Comment (1928) 37 Yale L. J. 1141.

is equally certain. Their habit of dragging the factors which control judgment out into the open beyond the reach of unnecessary language paraphernalia is one to be encouraged.[71] Nothing, on the one hand, will so promote a legal science as the recognition of the limitations of language as a control of judgment. And on the other hand, there is no instrumentality so necessary in making judgment effective as highly adaptable words. But these words do not have to be "canonized." "Rights" and "duties," "wrongs" and "faults" and their kindred must surrender their sanctity; scientific government is opposed. They are not to be trusted with power beyond that of conveying thought. We need less "authoritativeness" than we think. Judgment in the particular case, based upon all the factors which may be relevant at the time and place, as unobstruct-

[71] The clear expression of Cardozo, C. J., in Hesse v. Rath, 249 N. Y. 436, 164 N. E. 342 (1928), holding that the acquisition of an airport is a public and municipal purpose is a good example: "Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness." The celebrated case of Seaver v. Ransom by the same court, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187 (1918), is of the same sort. See also the remarks of Chief Justice Taft in Weil v. Neary, 278 U. S. 160, 49 S. Ct. 144, 149, 73 L. Ed. 243 (U. S. 1928).

ed and as clear as it can be given, is the immediate function of the multiple coiled judicial process. There is no assurance in such a formula save as it may be grasped by the intelligence of those to whom the power to pass judgment is entrusted. But government hangs here.

CHAPTER 5

THE NEGLIGENCE ISSUE*

It would be futile for the law (the judicial process) to attempt to deal in detail by way of precise anticipatory rule with each of the infinite number of cases which can be classified as "negligence" cases.[1] The number of such

*This essay was first published in 37 Yale L. J. 1029 (1928).

[1] The term "negligence" is employed in two distinct senses. In the first place it serves to cover that division of the field of tort liability roughly classified as "unintended harms" as opposed to "intended harms." But the division of "unintended harms" itself is made up of three segments which in turn are roughly classified as "accidental harms", "negligent harms," and harms on account of which "absolute liability" is imposed. The "negligence" category is the most important of this division and its dominance is reflected by the tendency to speak of all these cases as "negligence cases." It represents the most expansible and extensive single division of the law. Thousands of the most varied cases are so classified. A great many difficulties cluster about the devices employed for making distinctions between the cases of these neighboring categories.

The second usage of the term is more restricted. It indicates merely one of the elements disclosed by an analysis of a "negligence" case. These elements are: (1) the right—duty element, (2) invasion of plaintiff's right or violation of defendant's duty (the "negligence" issue), (3) causal relation, and (4) damages. See Newton Auto Salvage Co. v. Herrick, 203 Iowa, 424, 212 N. W. 680 (1927); Illinois Cent. R. Co. v. Cash's Adm'x, 221 Ky. 655, 299 S. W. 590 (1927); Green, Rationale of Proximate Cause (1927) 2. The negligence issue is the distinguishing factor in this class of cases and tends to overshadow all the other elements.

situations in which the quality of conduct can be measured by standards stated in terms of conduct is relatively small.[2] The torrents of pertinent factors incident to any wholesale attempt along this line are beyond classification and statement.[3] The qualities of personality are themselves numerous; their shadings are countless; the conduct of individuals is incalculable at present in its variety; the possible combinations of these are literally infinite, as infinite as space and time. The number of instances of conduct which could be labelled either as negligent or non-negligent is beyond the limits of any catalog the law can make. So it is not surprising that in the face of infinity the law does exactly what other sciences do in like situations. It adopts a formula: a formula in terms which will permit its problems to be reduced to a graspable size. This formula, like many other formulas, tends quickly to become ritual and it would seem that it is only this ritual which holds the law's interest. This much it insists upon

[2] These instances are largely confined to police regulations as the "Stop, Look and Listen" rule, speed limits, sale of poisons, and the like. In these cases precision of conduct is highly desirable. But even here the possible situations are so many that the integrity of those hard and fast rules is not infrequently violated. See Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756 (1916); Standard Oil Co. of New Jersey v. Roberts, 130 Va. 532, 107 S. E. 838 (1921).

[3] "But since it is impossible to anticipate the innumerable combinations of circumstances which may arise, it is impossible for the law to formulate in advance definite standards by which the propriety of conduct under every conceivable set of circumstances may be judged." Bohlen, Mixed Questions of Law and Fact (1924) 72 U. Pa. L. Rev. 111, 113.

rigorously, but this is as far as the law's science goes in this direction. It seems to have no interest in the "physical, mental and moral" qualities and characteristics of personality as such, nor in the qualities and characteristics of the "ordinary prudent person." [4] And while it is intellectually stimulating to inquire into the intelligence, experience, powers of memory, observation, coordination, the reaction time, self-control, courage, skill, ad infinitum, which the law might require of defendants, such inquiry is rendered utterly without profit for the purposes of determining the negligent conduct of any particular defendant in any particular case. The law does not make any attempt to require any of them in any one or more combinations. A formula in these terms has not been written which can be relied on to fit a single defendant in a single case.

[4] Two recent studies by able legal scholars have subjected "negligence" to most painstaking analyses. Edgerton, Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence (1926) 39 Harv. L. Rev. 849; Seavey, Negligence—Subjective or Objective (1927) 41 Harv. L. Rev. 1. See also Shulman, The Standard of Care Required of Children (1928) 37 Yale L. J. 618. See also numerous writers on the general subject as listed by Professor Edgerton.

After surveying the views of a long list of writers to the effect that negligence is or involves or consists of a mental state, Professor Edgerton concludes: "I submit that all this is erroneous. Negligence neither is nor involves ("presupposes") either indifference, or inadvertence, or any other mental characteristic, quality, state or process. Negligence is unreasonably dangerous conduct—i. e., conduct abnormally likely to cause harm. Freedom from negligence (commonly called "due care") does not require care, or any other mental phenomenon, but requires only

Legal analysis and classification have two immediate functions. First, they develop and bring to the surface the significant factors of a problem so that judgment can the more readily be passed. They discourage passing judgment in bulk, hence facilitate accuracy and consistency on the part of judge, counsel and scholar. Second, they permit the articulation of judgments so that they can be understood and employed for future guidance. They are at most machinery, but machinery for the employment of that ungraspable and indefinable power we call law by which the conduct of social beings is brought under control. As machinery there is nothing sacred about such devices, but their value cannot be over-emphasized, and if they are poorly designed the same harmful results follow as in the employment of poor machinery in making use of other highly dangerous forms of power.[5]

that one's conduct be reasonably safe—as little likely to cause harm as the conduct of a normal person would be." Edgerton, Id. 852.

Professor Seavey undertakes to ascertain: "• • • how far the conduct of one charged with negligence is tested in the light of his individual qualities and how far his peculiar qualities are ignored, and incidentally to deal with certain terms which are in customary use." Seavey, Id. 1.

Along with "the man of ordinary prudence" these writers consider at length such terms as care, reasonableness, risk, danger, foresight, intelligence, belief, knowledge, skill, memory, powers of observation, self-control, quickness of reaction, and a long list of other "physical, mental and moral" (Seavey) qualities and characteristics.

[5] The abstractions of the laws are hard to handle. Concepts whether vague or precise are imperiled by the very words to which

In the trial of a negligence case, the negligence issue may come to the surface at any one or more of five possible stages.[6] At four of these it demands the judgment of the judge; at the other, that of the jury. First, the judge may be called upon to determine whether some so-called definite standard set up by legislature or court, as for instance some traffic regulation,[7] controls this issue.

they are intrusted. Any adequate science of law awaits a science of statement. The definitions of scholars are sieves, the opinions of judges little more than a succession of mirages, even the precedents by which the course of judicial decision is determined are equally expansible and collapsible. But analysis and classification are indispensable. Though they retard the very progress they would promote, they are nevertheless the machinery through which the law and lawyers function. They are the most reliable aids to passing judgment, but they can never take the place of judgment.

[6] It is conceivable that there might be a sixth situation; that involved in the admission of evidence on this issue. The point will be adverted to later in the discussion.

[7] Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645 (1927), opinion by Justice Holmes, requiring a traveller approaching a blind railroad crossing to "stop, get out and go see," is a good example of this sort of formula set up by a court. Such formulas whether by court or legislature are of tremendous value, for they state the standard of conduct in terms of conduct itself. They make it possible to care for a large part of the every day business of the courts speedily, and especially so as to frequently recurring cases involving the violation of police regulations. But they may give rise to very difficult problems. For instance, it is not at all certain but that the formula announced by Justice Holmes is so belated as to be out of harmony with present day thinking. Are not underpass or overhead crossings or watchmen the price of exercising the high rights, powers and privileges of the railroad

If the case falls under such a crystallized rule, judgment on the negligence issue is automatic in those states which recognize the negligence per se doctrine, the inquiry being merely whether the party violated the terms of the regulation.[8] Second, the judge may be required in any case to decide whether under all the evidence the case on this issue should go to the jury. Is there a negligence issue for decision? This question is resolved by the well understood "reasonable inference" formula,[9] or its equivalent. Third, if the issue is made by the evidence the judge is required to translate it to the jury for their judgment.[10]

business? Jones v. Boston & M. R. R., 83 N. H. 73, 139 A. 214 (1927); see Green, Contributory Negligence and Proximate Cause (1927) 6 N. C. L. Rev. 3, 30.

[8] But not in those states which do not recognize the negligence per se doctrine. In those states, the third situation is presented. See Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701 (1911); Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488 (1881); Uhelmann v. American Ice Co., 209 Pa. 398, 58 A. 849 (1904).

[9] Metropolitan Ry. v. Jackson, 3 App. Cas. 193 (1877); McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66, 60 N. E. 282 (1901); Davis v. Margolis, 107 Conn. 417, 140 A. 823 (Conn. 1928). See infra note 15 for discussion of the value of this formula.

[10] It is reasonably certain that Professor Edgerton was dealing with this situation. "The result of the case must many times depend on whether they (juries) are given to understand that negligence is indifference or inadvertence." Edgerton, op. cit. supra note 4, at 860. "Confronted with such a definition—the intelligent juryman will gather either that negligence is or that it necessarily involves, relative indifference or relative inattention. * * *" Id. 861. "Innocent of the law's Pickwickian senses, juries must often take literally the definitions which are

Fourth, the jury must pass their judgment on the issue. Fifth, the judge may write an opinion articulating the judgment passed on the whole case, including the negligence issue. At this last stage the scene of action normally has changed to the appellate court with the appellate judge either approving or disapproving, in so far as the negligence issue is involved, the trial judge's action in dealing with one of the situations in the trial court, most usually the second or third. What is said by judges at this stage cannot be taken too literally.[11]

Although the jury has been utilized to save the judge the pains of passing judgment on the negligence issue, relatively the most important of the so called "fact" issues, nevertheless, the problems raised by this issue must be translated to the jury in each case. The difficulties which the jury device creates for the law are seldom realized and

given them, with the result that the law in action tends more strongly than the law in books to make particular mental phenomena necessary, if not sufficient, to negligence." Id. 870.

While Professor Seavey does not commit himself so clearly, inasmuch as he is dealing with the machinery incident to jury trial, he also must have this situation in mind. He says as much: "As will be pointed out later, the courts have not done this, but while asking the triers of fact to apply an external test as to some elements, as to others they have permitted consideration of the actor's qualities." Seavey, op. cit. supra note 4, at 5.

[11] "It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen." Magrane v. St. Louis & S. R. Co., 183 Mo. 119, 128, 81 S. W. 1158, 1159 (1904). See Birmingham Ry., Light & Power Co. v. Barrett, 4 Ala. App. 347, 58 So. 760 (1912).

cannot be exaggerated. The negligence issue gives its greatest difficulty in this translation process. The incisive studies of Professors Edgerton and Seavey have their relevancy, if at all, at this point.[12] These writers were inquiring into the quality or nature of the conduct which (the other elements being present) will impose or defeat responsibility, and how far the parties' own characteristics and qualities of personality affect the imposition or defeat of such responsibility. Since this is the jury's problem when there is any evidence raising the issue, how is the judge to translate it to the jury? This is a most practical question. Professor Edgerton objects to the instruction of juries in terms which make mental qualities and characteristics pertinent to the determination of the issue. He insists on "objective conduct" and "objective tests." [13] Professor Seavey, on the other hand, says that there is "only in part an objective test; that there is no such thing as reasonable conduct except as viewed with reference to certain qualities of the actor." [14] Under either view how can

[12] See supra notes 4 and 10.

[13] Aside from other considerations, if Professor Edgerton in the excerpt first quoted, supra note 4, intended to lay down a formula for use in determining the negligence issue, it is very clear that it is too broad. If "negligence is unreasonably dangerous conduct," it would include "intended harms" as well. On the other hand, why "conduct abnormally likely to cause harm?" Is not "conduct normally dangerous" enough? Also if mental phenomena are factors in conduct, what is the point in excluding them from consideration?

[14] See infra note 24

the jury be given its problem? Neither writer reaches this point.

Conceivably a judge might follow one of two radically opposite methods. He might make use of very accurate and precise rules, expressed in terms of conduct and qualities of personality by which the jury might measure the particular conduct of the person in question. For instance, he might say: "Gentlemen, if you find that defendant was possessed of an intelligence quotient of more than 90, and average reaction time to visual and auditory stimuli of .22 sec. and .2 sec. respectively, and a score of over 70 in mechanical abilities, and a grade of not less than C in caution and self control, and that he failed to conduct himself in accordance with these standards in the case before you, then you will find for plaintiff." Such instructions would be varied to suit the case. No doubt the judge would do some such thing if psychology could supply the law with dependable measurements and standards. On the other hand, the judge might merely say to the jury: "Gentlemen, this is your problem. You have heard the evidence. Give us your judgment." Either method might serve as well as the method which is now employed. But judges have employed neither; the one is clearly impossible, the other seems too dangerous. They have been more careful. Judges feel that laymen not only need assistance in handling these problems, but they must be kept within bounds. They cannot be permitted to roam at will nor to feel that they have an unlimited power in reaching judgment. Thus, judges have developed a technique of instructing

juries as to the considerations (law) which shall guide them in their judgment. It is here, therefore, that there is a necessity for the ritualistic formula mentioned in the beginning. But in employing this ritual a judge is faced with two difficulties. In the first place, in order not to pass judgment himself on the very person and conduct involved in litigation, and thereby render the jury's function pointless, he must raise conduct to terms of the law's abstractions: "care," "prudence," "foreseeability," "reasonableness," and the like. But having converted the problem into such terms, he must then make these high abstractions intelligible to the jury. And to do this, judges attempt to objectify these abstractions. It was in this predicament that the "man of ordinary prudence" was conceived as a standard of conduct.[15] He looks like a real fellow, the

[15] See Vaughn v. Menlove, 3 Bing. N. C. 468 (1837) and cases there discussed. The law frequently adopts this sort of device when it comes face to face with an otherwise uncontrollable flood of factors which have to be considered in all sorts of cases. For instance, in determining whether a case shall go to a jury on the negligence, or other issue, the law gives the judge no help except by way of one of these formulas. The judge is told to determine whether the evidence will support two reasonable inferences, whether reasonable minds can differ on the evidence. It does this because there is no way of stating beforehand in the run of cases any exact test. The factors are too numerous and relative. Even rulings on analogous situations are likely to prove deceptive here. The judge cannot escape passing judgment at this point, and the formula does not give him any assistance in weighing the factors of the particular case. It merely tells him that he must do so. The same thing may be said of the "preponderance of evidence," and "beyond a reasonable doubt" rules, and many others.

model of mankind. He is generally so considered. He is called the "objective" as opposed to the "subjective" standard. But all of this is due to vivid language. He is a mere figure of speech.[16]

The "man of ordinary prudence" with slight variations in his verbal attire is used by all courts in testing the negligence issue unless precluded by an automatic formula as adverted to above. The court instructs the jury that "negligence is the failure to do what an ordinary prudent person would have done under the circumstances or the doing of that which an ordinarily prudent person would not have done." [17] If more is required the court simply expands the same idea into other terms as "reasonableness," "care," "anticipation of harm," "danger," finally developing some such formula as Brett's generalization in *Heaven v. Pender*.[18] The courts do all they can to make these terms sound like vivid, living realities, but each is nothing more

[16] Thayer, Public Wrong And Private Action (1914) 27 Harv. L. Rev. 317.

[17] See Randall, Instructions to Juries (1922) § 4049 et seq. for a long list of these monotonous instructions from many jurisdictions.

[18] "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Heaven v. Pender, 11 Q. B. D. 503, 509 (1883). See also MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916). And a failure to use such care and skill is negligence.

than an objectification of a major abstraction. These phrases differ slightly from jurisdiction to jurisdiction, but not materially so, and in any particular jurisdiction the pattern adopted will be found to be followed along the closest lines. In fact the insistence of the courts upon nice shadings of these terms tends to turn the science of law into a jargon of quibbles. Most remarkable of all, the courts will allow no explanation of the central figure of this constellation of figments, "the man of ordinary prudence," by comparison with any real person or by describing him as possessing any other qualities or combination of qualities.[19] The farthest extreme to which courts will go in

[19] The care and prudence which the law regards as "ordinary" is such as prudent men are accustomed to exercise on like occasions—not such "as men generally," not such as "any man of ordinary care and attention," not "what a man of ordinary care would have done, riding as plaintiff was," etc., not "the usual order of ordinary care observed by men generally." A man of ordinary care, of ordinary prudence, as expressed in common parlance, is not regarded by the law as being to the common understanding the same as characterized by the expression "a prudent man", "prudent men." Reynolds v. City of Burlington, 52 Vt. 300, 308 (1880). See numerous cases to the same general effect: Hennesey v. Chicago & N. W. R. Co., 99 Wis. 109, 74 N. W. 554 (1898); City of Paris v. Tucker (Tex. Civ. App.) 93 S. W. 233 (1906); Cohn v. City of Kansas, 108 Mo. 387, 18 S. W. 973 (1891); Langhammer v. City of Manchester, 99 Iowa 295, 68 N. W. 688 (1896); Austin & N. W. Ry. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858 (1889); St. Louis, A. & T. Ry. Co. v. Finley, 79 Tex. 85, 15 S. W. 266 (1890); Louisville & N. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824 (1887). See Mertz v. Connecticut Co., 217 N. Y. 475, 112 N. W. 166 (1916). "While in some jurisdictions the ordinary usage or custom of the business or oc-

this direction is illustrated in *Grand Trunk R. Co. of Canada v. Ives*. After charging the jury in words practically identical with those indicated above, the court gave this further instruction, which was claimed to be erroneous:

"You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject." [20]

This charge is somewhat too literal for most courts. They do not care to be so plain about a matter which at best has an air of mysticism about it. With more than the usual liberality shown by most courts, the Supreme Court in passing on this charge, said:

"But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the

cupation is made the test of negligence, the weight of authority is that as negligence is the doing or failure to do what ordinarily prudent men would do under the same circumstances, the test of ordinary custom, while relevant and admissible in evidence is not controlling, especially when the custom is clearly a careless or dangerous one." Sea Board Air Line R. Co. v. Watson, 94 Fla. 571, 113 So. 716, 718 (1927); see Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co. (Tex. Com. App.) 298 S. W. 554, 563 (1927).

[20] 144 U. S. 408, 416, 12 S. Ct. 679, 682, 36 L. Ed. 485 (1891). See St. Louis, I. M. & S. Ry. Co. v. Spearman, 64 Ark. 332, 42 S. W. 406 (1897).

facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." [21]

Nothing is more obvious from a reading of the cases than that courts desire to pass the negligence issue to the jury as free from any commitments as possible and yet subjecting the jury to as much control as possible. That ex-

[21] Accord: Gallagher v. Great Northern R. Co., 55 N. D. 211, 212 N. W. 839 (1927); Crowley v. Chicago, B. & Q. R. Co., 204 Iowa, 1385, 213 N. W. 403, 53 A. L. R. 964 (1927); Baltimore, C. & A. R. Co. v. Turner, 152 Md. 216, 136 A. 609 (1927); Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., supra note 19; Hults v. Miller (Mo. App.) 299 S. W. 85 (1927).

pansible and all inclusive phrase "under the same or similar circumstances" [22] is employed as a blanket for every pertinent factor, and the courts seldom undertake to enumerate these factors. Under this phrase, the "ordinary prudent person" may be endowed if necessary with the very qualities of the party whose conduct is to be measured. If the party is blind, crippled, deaf, small, strong, nervous, experienced, aged, intelligent, stupid, or whatnot, this is but one of the circumstances under which the "ordinary prudent person" must act.[23] This personified standard

[22] "The rule has been repeatedly laid down that no definition is complete or correct which does not embody that element." Yerkes v. Northern Pac. Ry. Co., 112 Wis. 184, 193, 88 N. W. 33, 36, 88 Am. St. Rep. 961 (1901). See Garland v. Boston & M. R. R., 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924 (1913). As to duty to use "care and prudence of a prudent man in view of all the circumstances" in an emergency, see Landry v. Hubert, 100 Vt. 268, 137 A. 97 (1927); Peabody v. Northern Pac. R. Co., 80 Mont. 492, 261 P. 261 (1927). "The existence of an emergency is merely one of the factors in the light of which the conduct of the actor must be judged." Jones v. Boston & M. R. R., supra note 7, at 221.

[23] There is nothing in Vaughn v. Menlove, supra note 15, contradictory of this statement or of the following numerous sustaining statements. In Vaughn v. Menlove the only question involved is as to the proper method of leaving the issue to the jury. But the "under the circumstances" of that case allowed the jury to consider defendant's bona fides, his judgment, knowledge, etc., as is done in other cases. The court very correctly perceived the impossibility of stating a rule for each person. But that impossibility does not in any manner avoid the fact that if defendant in such a case were a poor ignorant "Brazos bottom" negro farmer on the one hand, or a prosperous agricultural chemist on the

sounds like an absolute one, but it turns out to be a variable. Nevertheless it enables the jury to pass judgment on the

other, such would be a most vital factor in the case, although the judge would give the same formula in each instance.

"In other words, every person must use that degree of care which prudent persons of his class, taking all circumstances into account, including health, strength and habits of body and of mind, would use, when acting prudently." Shearman & Redfield, Negligence (Street's 6th Ed. 1913) § 88.

"The jury ought to be possessed of the real facts including the age, the condition, the knowledge, the experience and capacity of the person injured, and then ought to be allowed to say whether, under all the circumstances, he acted reasonably or unreasonably; and this, in point of fact, is the theory upon which nearly all cases are tried." Thompson, Negligence (1901) § 338.

"If we apply to her the standard of what ordinarily careful women of her age and experience would do under like circumstances, how can we conclude that she was careless?" Kitsap County Transp. Co. v. Harvey, 15 F.(2d) 166, 168 (C. C. A. 9th), 48 A. L. R. 1420 (1927) annotation. (This was a woman 73 years old, who fell while getting out of her seat which was set on a platform 10 inches high from the floor of the boat. Is it to be supposed that the jury had many experiences of this sort by which to set up a standard for the old lady?)

"The plaintiff is to be held to the exercise of the degree of care of which he was capable. If he was merely a person of dull mind, who could labor for his own livelihood, and there was no apparent necessity of putting him under the protection of a guardian to keep him out of harm's way, he is chargeable with the same degree of care for his personal safety as one of brighter intellect, as any attempt to frame and adapt varying rules of responsibility to varying degrees of intelligence would necessarily involve confusion and uncertainty in the law." Worthington v. Mencer, 96 Ala. 310, 315, 11 So. 72, 73, 17 L. R. A. 407 (1891). (Plaintiff was mentally weak. The seeming contradiction between the first sentence and the last vanishes when it is considered that the court in the last sentence had in mind the difficulty

party's conduct in the light of the sort of person that party *is*. It is thus an adaptable standard, and thereby a work-

of stating the law for varying situations.) The courts constantly make the distinction between degree of care and quantum of diligence. See Gulf, C. & S. F. Ry. Co. v. Smith, 87 Tex. 348, 28 S. W. 520 (1894).

In Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205, 209, 12 N. W. 155, 42 Am. Rep. 470 (1882) the court said: "But while the authorities permit all the circumstances to be taken into account, age and sex among the rest, in determining the degree of one to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man." Judge Cooley, for the court, was here commenting on a charge approved by Snow v. Inhabitants of Provincetown, 120 Mass. 580, 585 (1876) to this effect: "Care implies attention and caution, and ordinary care in such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." Judge Cooley adds: "This no doubt is true."

"It would thus appear that though defendant was partially blind and illiterate, yet, if by the exercise of a prudent diligence and regard for his own rights, he might have protected himself against the fraud and imposition of the agent of the windmill company, it was his duty to do so; otherwise he will not be protected." Kalamazoo Nat. Bank v. Clark, 52 Mo. App. 593, 598 (1893). Again: "The evidence in this respect was, it seems to us, quite weak * * * The defendant seems to have blindly trusted the whole matter to the integrity of the agent, of the windmill company. * * * Notwithstanding this, the jury may have concluded that since there was evidence before them tending to show that defendant was a man far advanced in life * * * whose mental powers were bordering on imbecility; whose sense of sight was so dimmed by the infirmities of his great age that he could not see to read, or if he could see he would be unable to do so on account of his illiteracy, that he had exer-

able one. Whether this be objective or subjective perhaps no two people could agree, but neither is it necessary that they should.[24]

cised ordinary care and prudence under the circumstances. * * * These circumstances are elements that would naturally enter into the consideration by the jury of the question of negligence." Id., 599, 600.

"In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. * * * Hence the plaintiff is liable only for the proper use of his own faculties and what may be justly held to be contributory negligence in one is not necessarily

[24] Professor Seavey concludes: "Reviewing the whole matter briefly, it would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor - his physical attributes, probably, if superior, his intellectual powers, his knowledge and the knowledge he would have acquired had he exercised standard moral and at least average mental qualities at the time of action or at some connected time." Seavey, op. cit. supra note 4, at 27.

Certainly the party's conduct in question cannot be tested by his own lights, for no one besides himself can possibly know what they are. Hence the standard cannot be subjective in that sense. But on the other hand, this conduct can only be tested by the jury's capacity for passing judgment. Hence in this sense the standard cannot be other than subjective. It is difficult to see how the standard could be objective in any sense unless all that is meant is that the jury's standard is applied to the party's conduct. But is the point worth settling?

In cases of children and extreme abnormals of any kind (whether above or below the normal) the "ordinary prudent person" places too big a strain on the imagination, so the courts make a very rational adjustment or "reconciliation." The standard then becomes in case of the child that of the "ordinary child of the particular child's age, intelligence and experience," [25] while the physician must

such in another. There is no hard and fast rule applicable to every one under like circumstances." Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 238, 20 S. Ct. 380, 382, 44 L. Ed. 447 (1899). (Plaintiff was a boy 12 years old.) But the dictum is broad. It was applied to a mentally deficient adult in Seattle Electric Co. v. Hovden, 190 F. 7 (C. C. A. 9th, 1911).

See Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680, 14 L. R. A. (N. S.) 648 (1907); Masterson v. Lennon, 115 Wash. 305, 197 P. 38 (1921); Balcom v. City of Independence, 178 Iowa 685, 160 N. W. 305, L. R. A. 1917C, 129 (1916) (defective sight; the last case considers many cases). As to defective hearing, see Kerr v. Connecticut Co., 107 Conn., 304, 140 A. 751 (1928). "Age, defective vision, or hearing, or other infirmity, are circumstances to be considered by the jury in determining whether due care and caution have been exercised. The existence of one or more of these infirmities does not require a higher degree of care and caution than in the case of one having no infirmities." Rosenthal v. Chicago & A. R. Co., 255 Ill. 552, 560, 99 N. E. 672, 675 (1912). But cf. Toledo P. & W. Ry. Co. v. Hammett, 220 Ill. 9, 77 N. E. 72, 5 Ann. Cas. 73 (1906); O'Connor v. Hickey, 260 Mass. 110, 156 N. E. 838 (1927). See Texas & N. O. R. Co. v. Bean, 55 Tex. Civ. App. 341, 119 S. W. 328 (1909) (club foot of plaintiff merely one of the circumstances bearing on his contributory negligence).

[25] "No court ever says that a child is to be held to the measure of care which the particular child in question ordinarily exercises. On the contrary, the courts always state the measure with some objectivity. The usual statement is that a child is held to the

bestow "that reasonable care, skill and diligence as physicians in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." [26] In other words, the courts come as near as they dare say-

exercise of the degrees of care which ordinary children of his age, intelligence and experience (or whatever combination is used) ordinarily exercise under similar circumstances. Sometimes it is the care which is reasonably to be expected of children of his age, experience and intelligence. Sometimes it is the care of the class of persons to which the injured belongs. Sometimes it is the care of ordinary prudent and careful children of his age, experience and so forth; or of the great mass of children of his age, and so forth." Shulman, The Standard of Care Required of Children (1928) 37 Yale L. J. 618, 622. "The mental capacity, the knowledge and experience of the particular child, are to be taken in consideration in each case. These qualities are individualized—subjective—but only for the purpose of determining whether or not the child was capable of perceiving the risk of injury to himself and of avoiding the danger. Beyond that, there is an objective standard." Id. 625.

Is not the writer taking the objective method of stating the test too seriously?

[26] "The physician is bound to bring to the service of his patient and apply to the case that degree of knowledge, skill, care and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and in like localities." Nelson v. Sandell, 202 Iowa 109, 111, 209 N. W. 440, 441, 46 A. L. R. 1447 (1927) annotation.

"One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease is bound to bring to the aid of one so employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis, and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time." Ramy v. Tasciotti, 82 Vt. 79, 83, 71 A. 1045, 1046, 20 L. R. A. (N. S.) 1030 (1909) an-

ing to the jury that they must pass judgment on the *particular* plaintiff or defendant. But courts do and must insist that this standard, however it may be adjusted, must be kept a pure abstraction. If it becomes anything else, then the courts would either be compelled to state a standard in terms of the qualities and characteristics of human

notation. That is coming close home to the defendant. See generally 37 L. R. A. 830 (1897) annotation; Kuechler v. Volgmann, 180 Wis. 238, 192 N. W. 1015, 31 A. L. R. 826 (1924) annotation; Loudon v. Scott, 58 Mont. 645, 194 P. 488, 12 A. L. R. 1487 (1920) annotation. See (1928) 6 Tex. L. Rev. 398.

As to banks, see Bank of Monango, N. D., v. Ellendale Nat. Bank, 52 N. D. 8, 201 N. W. 839, 40 A. L. R. 889 (1926) annotation.

As to places of amusements, see Carlin v. Smith, 148 Md. 524, 130 A. 340, 44 A. L. R. 193 (1926) annotation.

As to druggists, see Ohio County Drug Co. v. Howard, 201 Ky. 346, 256 S. W. 705, 31 A. L. R. 1355 (1924) annotation.

As to power companies furnishing electricity, see McAllister v. Pryor, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 25 (1925) annotation; 17 A. L. R. 833 (1922) annotation.

As to carriers, see Ormond v. Wisconsin Power & Light Co., 194 Wis. 305, 216 N. W. 489 (1927); Gulf, C. & S. F. R. Co. v. Conley, 113 Tex. 472, 260 S. W. 561, 32 A. L. R. 1183 (1924) annotation.

In many of these cases the courts are unwilling to leave the jury to consider the great hazards of the activities involved merely as part of the "circumstances." They translate "ordinary care," into superlatives, doubtless for the greater emphasis. Denver Consolidated Electric Co. v. Simpson, 21 Colo. 371, 41 P. 499, 31 L. R. A. 566 (1895). See excellent opinion by Lairy, J., in Union Traction Co. of Indiana v. Berry, 188 Ind. 514, 121 N. E. 655, 124 N. E. 737, 32 A. L. R. 1171 (1924) annotation. Also see excellent article, Frederick Green, High Care and Gross Negligence (1928) 23 Ill. L. Rev. 4.

conduct, a thing they cannot do and will not undertake to do, or else would be forced to admit that there is no standard which they can give the jury. This latter also, is unthinkable, as it would immediately give the jury too great latitude. The "man of ordinary prudence" can only serve his function as an abstraction. In this way he is a mere caution, pointing the jury in as dramatic a way as possible the directions their deliberations should take. The judge through him can indicate to the jury that they are dealing with society's power and not their own; therefore, they should act reasonably and not let their own desires run riot. The formula is as much for controlling the jury's deliberations as for measuring the party's conduct. Its beauty is that it can be used for both purposes without committing the judge to anything and without telling the jury anything that amounts to more than a sobering caution. It does exactly what any good ritual is designed to do; its function is psychological. It serves as a prophylaxis. Nothing more should be expected of it.

The "ordinary prudent person" seems, therefore, to have been taken too literally. Both judges and legal scholars have undertaken to analyze him into terms of human qualities. He and his accompanying retinue of phrases are much like the points, lines and spaces of geometry, and the *X*, *Y* and *Z*s of algebra. "Let *X* equal the distance and *Y* the time, etc." Suppose some one should suggest that this be analyzed, and should proceed to point out that *X* and *Y* are letters of the alphabet, and further propose to count the words in which each appears for the purpose

of determining their nature and characteristics. Or suppose some one else should propose to put a ruler on all the *Xs* and a stopwatch on all the *Ys*. Are not the "ordinary prudent person," "reasonableness," "foreseeability," "care," "danger," "same or similar circumstances," etc., merely the *Xs* and *Ys* of the law employed in negligence cases? Are not they used purely for the purpose of reducing the problem to a statable form? First, statement by trial judge to a jury in translating the negligence issue for the jury's judgment. Second, statement in opinions so that the process may be articulated for the purposes of a record. The law's inability to deal with human behavior in detail and "in the raw" compels it to deal with such behavior for purposes of statement by the use of figures and symbols. But the figures and symbols employed being the same as some of those employed in describing specific details of human behavior, the two uses are confused.[27] It is much as if numerals were used in the place

[27] Professor Edgerton makes this point very clear in his analysis of "care" and other terms but complains about its "technical" meaning and use. He says: "They (juries) are charged in terms that are wholly ambiguous and left to make their own selections among the competing theories." Edgerton, op. cit. supra note 4, at 860. He correctly points out throughout his article that the law is administered through words used in "Pickwickian senses."

Professor Seavey makes similar points: "Prudence has a selfish connotation, obviously not intended here, except in the case of contributory negligence. 'Care' avoids this but obviously avoids reference to a possibility of error as to valuation of interests. 'Sense' refers only to intellectual elements. 'Skill' as will be indicated later, probably combines too many elements for us to re-

of letters for algebraic purposes. But does this use of these figures and symbols mean that the qualities and characteristics of the human beings involved in the litigation are not to be considered by the jury in passing judgment? *Or does such use merely mean that such qualities and characteristics are of no moment in a statement of the law for use by the judge in translating the issue to the jury.*'[28]

On this point Professor Edgerton says:

"The individual's actual mental characteristics and qualities, capacities and habits, reactions and processes, are not, then, among the 'circumstances' which the law considers in determining whether his conduct was, under the circumstances, reasonably safe. He must behave as well (as safely) as if he were in all mental respects normal, though he may be in some respects super-normal. In fact,

quire the actor to have a standardized skill in all situations." Seavey, op. cit. supra note 4, at 10.

See to same effect Shulman, op. cit. supra note 4, 625: "At any rate, it (prudence) is a conveniently vague term to admit of adjustment to particular situations in a field of law where certainty in advance is not all-important."

[28] The jury device is probably the principal reason why formulas and symbols must be used. In trial before a judge, nothing of this sort would ordinarily appear prior to judgment. That he should employ for his own purposes the rigmarole he uses in instructing juries, would only be understood by reason of some brain pattern which he has built up through which to think of such matters. But when he comes to articulate his judgment in the form of an opinion, he is compelled to use some terminology, and the same figures of speech which he employs for jury purposes are found to be useful here. In both instances, it will be noted they are for the purposes of statement, though with different ends in view.

the broad proposition that no mental fact about the (same) individual is material would seem to require only one substantial qualification; his special knowledge is highly material." [29]

Further:

"As Mr. Justice Holmes has said, 'when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account' (Holmes, The Common Law 108). Dean Pound has put as the 'jural postulate of civilized society' which underlies our doctrine of negligence, that 'men must be able to assume that their fellowmen, when they act affirmatively, will do so with due care, that is, with the care which the ordinary understanding and moral sense of the community exacts, with respect to consequences that may be anticipated'." [30]

These eminent authorities were doubtless postulating for the purposes of *statement*. For this purpose, clearly the personal qualities of each individual cannot be con-

[29] Edgerton, op. cit. supra note 4, at 857.
[30] Id. 867, 868.

sidered. But for the purpose of *judgment passing,* the jury is beyond the realm of statement, and that the awkwardness of the awkward man, the poverty of the poor man, the stupidity of the dunce as well as the skill of the expert, along with the special knowledge of the specialist and the numerous other qualities of the person involved, are all considered in our earthly courts is too well known to leave a doubt. *The difference lies between law in statement and law in operation; between jural postulates and jury judgments.*[30a]

What do the jury do with this terminology, "the ordinary prudent person" and his "attendants," when they retire to the jury room? Do they take them seriously? Show them any consideration? Spend any time trying to determine that each juror has the same "ordinary prudent person" in mind, or do they merely assume that everyone is fully acquainted with him, and that they know what the court desires? How any particular jury arrive at their judgment is perhaps unknown even to themselves. But a "scientific" statement of law has very little if any interest in how they shall treat these terms. The law provides the jury with no table or key by which they can translate these symbols into the terms of human conduct and human qualities. The law recites its ritual and stops. Moreover, it closes the door on the jury and guards them with its officers. A few rules of etiquette are provided,[31]

[30a] Dean Pound appreciates this difference fully. See Pound, Justice Without Law (1913) 13 Col. L. Rev. 696.

[31] These rules include such prohibitions as communicating with the judge except in open court, or discussing the case with third

but no inquiry must be made of the jurors themselves into their deliberations. Whatever process they may go through, in the end the result is the product of the jury's own judgment, and this is the law's judgment so long as in reaching it the jury have observed the etiquette of the occasion. But it is only the law's judgment in the particular case; it has no further currency. The next case will have a like body to pass judgment.[32] In short, having developed an agency for giving judgment and a ritual for passing the negligence issue to that agency for judgment, the factors which the jury may take into account are of slight, if any, importance in any scientific statement of the law. Here science is satisfied with ritual; so long as the jury's judgment is not outrageous, it stands. The law has been satisfied by the translation of one of its important issues from judge to jury through the medium of a figure of speech. No one should expect this figure of speech to stand analysis except as a figure of speech. It cannot be dissected into bone and blood, virtues and emotions, any more than the motion picture we see on the screen. The particular figure here involved serves its function when the jury has taken the case. What *juries do*

persons, accepting favors from litigants, taking liquor into the jury-room, giving evidence in the jury-room, deciding the case by the toss of a coin, the turn of a card or other trick. In a few states, inquiry can be made directly of the jury as to such objective conduct, but in no state can the factors impelling judgment be gone into. See McBaine, Cases on Trial Practice (1927) 853, 854.

[32] See Bohlen, Mixed Questions of Law and Fact (1924) 72 U. Pa. L. Rev. 111 et seq.; Green, op. cit. supra note 1, at 72 et seq.

in reaching a judgment is wholly a different thing, entirely unrelated. They pass into one of the "laboratories of justice" and there deal with actual human beings—passing the judgment which the judge through the device of picturesque language calls upon them to pass. It is their *judgment* on the factors giving rise to the issue that the law desires—nothing less and nothing more. If the law could tell them how to pass this judgment it would have no need for them.

If the law (for purposes of statement) is merely interested in having the judge pass the negligence issue to the jury in doubtful cases under due cautions but without undue embarrassment of the jury's power to deal with the issue as their judgment may dictate, is it to be implied that the qualities and characteristics of the conduct of the persons in litigation are of no significance for the purposes of the jury? This cannot be. They are factors of importance. Negligence cases are decided every day in which they are considered by juries. Age, sex, color, temperament, indifference, courage, intelligence, power of observation, judgment, quickness of reaction, self control, imagination, memory, deliberation, prejudices, experience, health, education, ignorance, attractiveness, weakness, strength, poverty, and any of the other possible assortments of qualities and characteristics of the persons involved may each be a factor in the jury's judgment on the negligence issue. It would doubtless be safe to go further and suggest that these same qualities of both counsel and witnesses also have the greatest weight with the jury. Litigants act on this assumption at any rate. But the law

does not undertake to analyze or weigh any of them for the jury except in the most timid fashion.[33] They seldom come to the surface either in the pleadings, the evidence, or the instructions given by the judge, and when they do, doubtless ordinarily they merely give color to some more important factor, or bundle of factors. But in whatever form they come up, the judges constantly recognize them by reiterating that the question was one for the jury and that they had the parties and witnesses before them and their basis for judgment was necessarily more complete than any paper record can provide. These factors in single units become articulate in rare instances. They are so normally common factors of every case that they are virtually ignored. They lie beneath the formal statements of pleading, and they are above the rules of evidence. How could they be kept from the jury where they fill the interstices of all that is done and said during a trial? The rules of evidence are primarily rules of exclusion. All

[33] The cautionary charges given by courts are in recognition that some of these factors are considered by juries. Charges that the jury must look only to the evidence in the case, that they must try a case against a railroad the same as against an individual, are to be influenced by the facts and not by sentiment, not to base their verdict upon own view of premises, and similar ones, are but the efforts of judges to restrict the jury's deliberations to the serious business of deciding the case in hand on the most rational basis possible. See Randall, op. cit. supra note 17, c. 30; Dunlop v. United States, 165 U. S. 486, 17 S. Ct. 375, 41 L. Ed. 799 (1897); State v. Runyon, 93 N. J. Law, 16, 107 A. 33, 109 A. 925 (1919); Thompson, Trials (2d ed. 1912) § 2866 et seq. No one thinks that they have more than a sobering effect, or that the factors at the basis of judgment are erased in any such manner.

relevant facts are admissible unless some specific rule forbids.[34] It may be that the factors in question are seldom "evidence" in the procedural sense; they may be mere "background" or "atmosphere." But what is weightier? The law of evidence is rational; it would not undertake a vain thing; it cannot deal with every factor pertinent to passing judgment. It could not take formal notice of such numerous and such variable details without wasting much effort to no purpose. It is only when some of the more comprehensive personal attributes as "knowledge" and "habit" [35] become involved in this type of case that the law of evidence takes a hand, and even then it more frequently refuses to do so.

[34] See Wigmore, Evidence (2d Ed. 1923) § 10. But also note the conclusion of Professor Edgerton: "The fact appears to be, not that the law of evidence is so inept and inconsistent as to exclude direct proof of these various mental facts while it admits direct proof of intention, but that, as a matter of substantive law, these mental facts have no bearing on negligence." Edgerton, op. cit. supra note 4, at 855.

[35] State v. Manchester & L. R. R., 52 N. H. 528, 532 (1872); Brouillette v. Connecticut River R. Co., 162 Mass. 198, 38 N. E. 507 (1894). It would seem that psychologists could not find a richer nor a more fruitful study than the part these incidental factors play in jury verdicts. See Hutchins and Slesinger, Some Observations on the Law of Evidence—Spontaneous Exclamations (1928) 28 Col. L. Rev. 432 and Some Observations on the Law of Evidence—Memory (1928) 41 Harv. L. Rev. 860. It is true that much would have to depend upon the observer's capacity to interpret human behavior at large, but even so, such studies would be of incalculable value both as to assessing the importance of the factors and as to suggesting means for perfecting a technique for bringing them under some sort of control.

What has been said as to the rules of evidence may be said as to the giving of instructions. The law cannot deal with these factors in detail; therefore, it ignores them. They merely make up the "circumstances" [36] of the case, but here they get such recognition as the jury may give them in the particular case. It is only when a party wishes to get an advantage from stressing some one of these qualities or characteristics which stands out in a particular case that such a factor is given formal notice. The judge may think the factor of no pertinency or of the greatest pertinency in the particular case, but an admission or exclusion from the formal evidence, or a charge or a re-

[36] City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53 (1902) (plaintiff's forgetfulness of a post, one of the circumstances); Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241, 1087 (1901); Slaughter v. Metropolitan St. Ry. Co., 116 Mo. 269, 278, 23 S. W. 760, 763 (1893) ("we know no rule of law requiring them (the jury) in measuring his conduct at the time to exclude from their consideration any of the natural instincts which usually affect the conduct of men").

"If in a moment of forgetfulness, with her aged mind intent upon disembarking, she did what otherwise she would not have done, she is not for that reason necessarily subject to a charge of carelessness. It is a familiar principle that one is not necessarily guilty of negligence who in a moment of forgetfulness is injured by reason of a defect in a sidewalk, or a street or other public place, though he had knowledge of its existence. 37 Cyc. 298. That people do in forgetfulness trip over unusual obstacles upon a floor with which they are familiar, or stumble over unusual steps under like circumstances, is a matter of common knowledge." Kitsap County Transp. Co. v. Harvey, supra note 23, at 168. Thus courts may take judicial notice of such things; a fortiori, a jury may also, when such matters are pertinent.

fusal to charge, in one instance, does not necessarily have any significance in some other instance where the same factor may be involved. The possible number of situations is so large that the law cannot deal with them in advance of trial. And doubtless the law is wise in not attempting to do poorly by rules what is already better cared for as the accepted but unnoticed incidents of every trial.

The difficulties of dealing with the other problems of negligence cases—the right-duty problem, the damage problem, and the causal relation problem—are not under consideration. Each of them has its own difficulties. The problem here is that of handling the issue of "wrongdoing," "breach of duty," the negligence issue. The most obvious conclusion is that in the great bulk of cases of this type there is no method of ascertaining in advance whether conduct is negligent or non-negligent. At most, a method has been devised for testing conduct after it becomes known. The method is not difficult to state, but its satisfactory employment must rest upon the capacity of judges to know when it is applicable, and the capacity of juries to exercise a fair judgment on all the factors involved. As an element of legal responsibility it is at large, and defies the efforts of legal scientists to bring it under more definite control. As much as can be done is to state the process. The science of law at this point requires nothing more, nor will it accept anything less, than adherence to its process. It may well be that the "law of negligence" is so uncrystallized (except for an inconsequential

part) that it cannot be subjected to statement other than in terms of an analysis through which the cases must be run as they arise. In other words, we may have a process for passing judgment in negligence cases, but practically no "law of negligence" beyond the process itself.

CHAPTER 6

RULES OF CAUSATION [1]

CAUSAL RELATION

The cases involving "cause" problems are multiple, but may be classified for the purpose of this discussion into two types. The simplest type assumes, first, that the defendant has done something; second, that another person has suffered some hurt; and third, that the defendant is responsible, *if there is causal relation between the defendant's conduct and the other's hurt.* This relation between conduct and hurt must be found in all cases, whether classified as crime, tort or otherwise. It arises in many forms.

Did *X* die from a potion administered by *D*, by suicide, or from some disease? [2]

The defendant shot a gun. *A* also shot a gun. *X* has a wound. Did *D's* shot give the wound? [3]

[1] This chapter was read and discussed at the round-table on "Wrongs" held at the meeting of the Association of American Law Schools, December 28, 1928. The subject of the discussion was: "Differences, if any, between the rules of causation in crime and in torts." It was first published in 77 U. of Pa. L. Rev. 601 (1929).

[2] Yaggie v. Allen, 24 App. Div. 594, 48 N. Y. S. 827 (1898); Walden v. Bankers' Life Ass'n, 89 Neb. 546, 131 N. W. 962 (1911).

[3] Oliver v. Miles, 144 Miss. 852, 110 So. 666, 50 A. L. R. 357 (1927), discussed in (1927) 27 Col. L. Rev. 754. The defendants X and Y, while hunting together, fired simultaneously across a

Was the deceased's death due to a fall or to appendicitis or to cancer? [4]

Did the deceased die of heart disease or an electric shock? Did the plaintiff's child die from burns or pneumonia? [5]

D's servant put *X* out of a conveyance at the foot of a hill. *X* climbed the hill and entered her house, where she collapsed and died. Did *D's* conduct in putting her out at the foot of the hill play a material part in her death? [6]

D's street car was roughly handled. *P* fell and bumped his head. Seven months later he suffered a stroke of paralysis. Did the rough handling of the car have an appreciable part in the paralysis? [7]

The defendant railway cut a telephone line so that the plaintiff was unable to get the doctor to attend his wife.

public highway. The plaintiff was struck by one of the shots, but he did not know which one. Wilson v. State (Tex. Cr. App.) 24 S. W. 409 (1893).

[4] Ætna Life Ins. Co. v. Wicker, 240 F. 398 (C. C. A. 2d, 1917); Ashelby v. Traveler's Ins. Co. of Hartford, 131 Minn. 144, 154 N. W. 946 (1915); Abendroth v. Fidelity & Deposit Co. of Maryland, 73 Ind. App. 50, 124 N. E. 714 (1919).

[5] Robinson v. Western States Gas & Electric Co., 184 Cal. 401, 194 P. 39 (1920); Longuy v. La Societe Francaise De Bienfaisance Mutuelle, 52 Cal. App. 370, 198 P. 1011 (1921).

[6] Tullgren v. Amoskeag Mfg. Co., 82 N. H. 268, 133 A. 4, 46 A. L. R. 380 (1926).

[7] Bishop v. St. Paul City Ry. Co., 48 Minn. 26, 50 N. W. 927 (1892); Benson v. Altoona & L. V. Electric R. Co., 228 Pa. 290, 77 A. 492 (1910).

Was the cutting of the wire a material factor in causing the wife's death? [8]

D's conductor sent *X* back to remedy a hot box. Without warning *X*, the conductor gave orders to start the train. Later *X* was found dead near the track with his limbs severed. Did the conductor's starting the train without warning have a substantial part in causing *X's* death? [9]

X drank milk and ate beans,[10] and within a few hours developed poisoning. Did the milk or beans poison him?

Did the plaintiff rely upon the representations of the defendant, or upon his own investigation, in giving credit to *X*? [11]

Was the plaintiff's loss of health a result of the slanderous statements made by the defendant? [12]

[8] Hodges v. Virginia-Carolina R. Co., 179 N. C. 566, 103 S. E. 145, 10 A. L. R. 1452 (1920).

[9] Moores v. Northern Pac. R. Co., 108 Minn. 100, 121 N. W. 392 (1909); Nealis v. Chicago R. I. & P. R. Co., 173 Minn. 587, 218 N. W. 125 (Minn. 1928); Kapusciauski v. Philadelphia & Reading Coal & Iron Co., 289 Pa. 388, 137 A. 619 (1927).

[10] Buel v. Kansas City Life Ins. Co., 32 N. M. 34, 250 P. 635, 52 A. L. R. 367 (1926); Newsoms v. Commercial Casualty Ins. Co., 147 Va. 471, 137 S. E. 456, 52 A. L. R. 363 (1927). For similar inquiries: Ginsberg & Sons v. Wabash R. Co., 219 Mich. 665, 189 N. W. 1018, 28 A. L. R. 518 (1922); Wunsewich v. Olsen, 137 Minn. 98, 162 N. W. 1054, 2 A. L. R. 560 (1917); Hiatt v. Travelers' Ins. Co., 197 Iowa, 153, 197 N. W. 3, 33 A. L. R. 655 (1924).

[11] Addington v. Allen, 11 Wend. (N. Y.) 375 (1833); Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788 (1901); Id., 185 Mass. 563, 70 N. E. 1040 (1904); other cases cited in Bohlen, Cases on Torts (2d Ed. 1925) 763.

[12] Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420 (1858)

This type of case can be varied infinitely, first, in the conduct on *D's* part; second, in the combination with the conduct of other persons, and third, in the results. But so long as the inquiry is whether *D's* conduct played a part, or a material part, in producing the hurt which supplies the subject of investigation, the question is relatively simple. Even here the absence of data, the multiplication of data, or the obscurity of the available data, may make the problem a difficult one. But the difficulties are those common to all proof, and they may arise on the same facts in a criminal prosecution, in an action for negligence, and on a policy of insurance. Every sort of data which will support an inference in other situations may be availed of here, but probably the expert is called upon more frequently to trace the workings of cause and effect than in any other type of case.[13] But assuming that there is some proof made, the weight to be given to the evidence requires the judge to exercise his normal function of saying whether there is a basis for two reasonable judgments. If there is not, the case ends for failure of proof to show causal relation. But if the proof is sufficient, the case will be sent to the jury. In criminal cases the court will require the jury to believe beyond a reasonable doubt before a find-

Bohlen, op. cit. supra, note 11, at 792; Comment (1928) 36 Yale L. J. 1148.

[13] State v. Elftman, 116 Kan. 214, 226 P. 795 (1924); Wilson v. State, 195 Ala. 675, 71 So. 115 (1916); State v. Price, 135 Minn. 159, 160 N. W. 677 (1916); Murray v. United States, 53 App. D. C. 119, 288 F. 1008 (1923); and supra notes 2, 4, 5, 6, 7 and 10.

ing is made against the defendant, while in most jurisdictions in tort cases the jury may base their finding on a preponderance of the evidence.

These are not the problems of "causation" which afford the difficulties courts talk about under that head. An examination of the current case books on criminal law and torts discloses few cases under that heading which present a problem of this type. These cases are not even digested separately but are found scattered here and there under many headings. As a problem of causation its treatment is largely incidental. It is not *what* caused the hurt, but was the *defendant's conduct* a factor in producing the hurt. Jeremiah Smith's "substantial factor" [14] phrase, sometimes stated as a "material," [15] or "appreciable" [16] factor, puts the problem aptly enough, but it affords no answer. The answer is only to be had in the judgment of the particular tribunal, whether judge or jury, to which the problem is allocated by the judicial process. But it will be noted that neither this phrase nor its synonyms cramp judgment. It is one of the easiest inquiries courts have to make. No rules of law aside from the general rules of procedure are required and none could be found if they were sought. Each case calls for a fresh judgment.

[14] Smith, Legal Cause in Action of Tort (1912) 25 Harv. L. Rev. 103, 223, 305, Selected Essays on Torts (1924) 649, 711, 712.

[15] Anderson v. Minneapolis, St. P. & S. S. M. R. Co., 146 Minn. 430, 179 N. W. 45 (1920); Wilson v. State, supra, note 13; Green, Rationale of Proximate Cause (1927) 134

[16] Sellers v. Reice Construction Co., 124 Kan. 550, 262 P. 19 (1927).

But it is remarkable to what extent confusion arises even in dealing with this relatively simple problem. It is repeatedly insisted that there must be something further by which to measure this "substantial factor," or that it is merely the "*causa sine qua non*," "but for," or some other test in disguise. This attitude indicates the failure to appreciate the purpose for which the formula is used, and thus its whole significance is lost.

The inquiry here involved is causal relation between the defendant's conduct and the plaintiff's hurt. It can be stated in several ways, such as physical cause, or scientific cause, or cause and effect, or otherwise. The idea is the same in all of these. Causal relation presents a jury question if an issue at all. Thus it is said to be a matter of "fact." Ordinarily it is so clear that the question should not be submitted. Nevertheless courts do submit it in nearly all cases, and since such practice is seldom hurtful, I make no point of the uselessness of submitting the issue. But when the issue is submitted, whether necessary or not, it should be submitted sensibly. The judge's functions at this point are two: (1) to determine whether the evidence raises an issue, and (2) to submit the issue. *It is for the latter purpose only that the formula suggested has any function to perform.* For that function it is useful. It is simple; it calls the attention of the jury to the question on which a jury's judgment is desired; it does not mislead the jury. It thus serves the function for which it is designed, however modest that may seem. Unless the narrowness of the point is constantly kept in mind, this formula cannot be dealt with intelligently.

For such a purpose the "*sine qua non*" formula would be too scholastic unless translated. But the larger objection is that no reliance can be placed upon it. It falls down in the multiple cause cases [17] (which, as a matter of fact, include all cases), as well as in the successive cause cases.[18] In no case does it present the issue to be determined. It sends the inquirer back to discover if the result could have happened without the defendant's participation. The assumption is that if the result would have happened anyhow, then the defendant is not a cause. Such an inquiry at this point is vicious from two aspects: (1) it presents an inquiry impossible of determination; the case is not what *might* have happened but what *has* happened; (2) the inquiry while stated in what seems to be terms of *cause* is in fact whether the defendant should be held responsible.[19] Hence this formula does not present the simple inquiry as to whether the defendant's conduct was *a* factor in the result. The latter is the subject pertinent at this stage, and while it may not always be simple, inasmuch as it calls for a capacity to measure the effects of a multitude of factors which are found in most cases, still, out of the many things that must be done in fixing responsibility as a whole, it is possibly the detail that can be done best. And this is true even though it may be conceded that quantitative measuring can never be definitely

[17] Infra, notes 22, 23, 24, and 43.

[18] Illinois Cent. R. Co. v. Wright, 135 Miss. 435, 100 So. 1 (1924); Douglas, Burt & Buchanan Co. v. Texas & P. R. Co., 150 La. 1038, 91 So. 503 (1922).

[19] Green, op. cit. supra, note 15, at 167–170.

or accurately done in such matters. Our every-day existence in a thousand different ways depends upon this very capacity, and most people are capable of making very good guesses where the ordinary affairs of life are involved. The formula of Jeremiah Smith merely focuses attention on the fact that measuring must be done at this point. The judicial process, as developed through the common law, requires that such be done. The function has been allocated to the jury. So long as the jury keeps within the procedural rules, its judgment on the question is final. That is the method by which such questions are settled and there is nothing more to be said. If any other method had been adopted, there would have been the same necessity for reaching a stage of finality. But at what point judgment will fall in the particular case cannot be anticipated, nor can it be controlled by rules or formulas. The process leaves the jury free—and the freer the better—to give its judgment, and whether the world at large agrees or not is wholly immaterial. Government having allocated the power to pass judgment to the jury, all that judges and legal scholars can do is to formulate adaptable phrases for passing the problem to the jury. There is no reason why any other phrase which can perform this function should not be used. While uniformity of expression accelerates administration, an insistence upon too great uniformity does the other thing.

It may be suggested that sometimes judges try cases without juries. But in such cases judges, although they are in fact laymen as to this sort of question, do not spend any time charging themselves. But assuming that they

employ for their own thinking the same formulas which they use for instructing juries, the "substantial factor" formula will present the question to them as aptly as to a jury. However it does not make judgment automatic. They, as a jury, exercise their power of judgment and that is the end of it for that case, always excepting the power of an appellate court to do the contrary if it takes another view of the matter. As in the case of a jury, there is no way to anticipate or control the judgment of the judge. Thus I would conclude as to this type of causation that, while no rules are possible, there is a necessity for the formulation of adaptable phrases for use in passing to a jury the questions they must decide. It is a problem in the use of language. Uniformity of expression is desirable so long as it is not insisted upon to the extent of inflexible ritual.

What I have said so far is no more than well-recognized legal theory. It is the method we should like to follow in trying cases. As a matter of fact, when a case is submitted to a jury, however clearly marked may be the issues which the jury are supposed to answer, I have always felt that in most instances they give their answer on the *whole* case. Full recognition of this fact is given, and allowance made for it in negligence cases, in the formula devised for submitting the *negligence issue* to the jury. The "reasonable care under the circumstances" formula gives a jury the widest latitude for considering the whole case.[20] Nor do I object, for after all it is the judg-

[20] See my article, The Negligence Issue (1928) 37 Yale L. J. 1029; also my article, The Duty Problem in Negligence Cases

ment of laymen on the whole case that organized society desires. But there is nothing to be gained in giving the jury the same latitude a second time under the *causation* issue. The latter issue is much narrower than the negligence issue and calls for a different sort of judgment. The determination of negligence requires a judgment on all of the factors which we sum up under "policy." But causal relation calls for "scientific fact." There is no simpler way to express the latter than to call it "causal relation"; and there is no simpler way to submit it to a jury than through a formula calling upon the jury to say if there is any "material," or "substantial," or "appreciable" connection between the defendant's conduct and the plaintiff's hurt. There is extremely little work for such a formula to do, for normally causal relation is so clear that a judge would not be warranted in submitting it to a jury. The major defect in present practice is that judges do not recognize what a narrow problem causal relation is, and in almost every case submit some other problem which should not be submitted to a jury at all, or submit the negligence issue a second time, under a supposedly "*proximate cause*" formula. The latter formula is in reality nothing more than the *negligence* formula stated a little differently.

(1928) 28 Col. L. Rev. 1014, 1023, 1030. There is much yet to be done in developing the process for allocating functions to judge and jury in the particular case. In my article, A New Development in Jury Trial (1927) 13 A. B. A. J. 715, I attempted to outline the progress made in this direction in three states.

LIMITATIONS UPON RESPONSIBILITY IN TERMS OF "PROXIMATE CAUSE"

Along with the type just considered is frequently found another kind of problem of the greatest difficulty which the courts treat also as a "cause" question. This is known by many names, but is probably best known as "proximate" or "legal" cause. It will be noted that the mere statement of a case involving a "cause" problem of the latter sort eliminates any question of causal relation in the sense first discussed. Causal relation must be assumed in these cases, or there is nothing further to talk about. The problems dealt with under "proximate causation" involve limitations upon legal responsibility or legal protection—the phase of legal theory concerned with rights and duties. They are the same problems as are involved in statutory construction, interpretation of contracts, in the employment of assumed risk and contributory negligence as defenses, and in the great host of privileges found in defamation as well as in the interferences with the relations existing between other persons. Many of the hardest problems involved in ascertaining the protection given under the statutes dealing with homicide, in determining the scope of accident policies and other contracts, and especially the scope of protection afforded under the broad common law rules of torts, are dealt with in terms of proximateness and its opposite—remoteness. Various type situations have developed their own terminology, and, due to our fragmentary and helter-skelter legal theory, any difficult question can be readily translated into at least several of these phrase

networks. A court is seldom limited to a single choice. It does not seem that this idea is widely appreciated in view of many of the debates about conflicting legal doctrines.[21] But once it is recognized, many of the seeming paradoxes in legal theory disappear completely. That the difficulties which arise in negligence cases, for example out of distinctions between contributory negligence and assumed risk, are of this sort would probably be readily conceded. It is equally so as to contributory negligence and proximate cause, last clear chance, wilful and gross negligence, and other phrases used in these cases. Likewise in deceit cases there are various sorts of false statements, material statements, and statements of opinion and fact, and other such terms. In defamation, libelous, slanderous, privileged statements, privileged occasions, malice, fair comment, truth, and others, supply another group of highly expansible and interchangeable phrases for the cases classified under that heading. Every group of cases has its own set up of phrases. And what is more, it will be found that each court, if not each judge and each lawyer, although using the same words, will differ from case to case in the method of identifying through these phrases the questions on which judgment is to be passed. In a negligence case, for instance, one judge will identify the question as one of negligence, while another will insist that it is one of legal duty or of contributory negligence, or assumption of risk, or proximate cause, or mitigation of damages, or last clear

[21] The idea is worthy of much fuller elaboration than can be given here.

chance, or what not. Much confusion can be accounted for by a recognition of the fact that all words are not the same to all people. Nevertheless, most of us are constantly contending that someone else is wrong and we are right in the use of terms, as if there could be a right and a wrong in such matters. Convenience is at a high premium in these matters, but to require of the use of language, and of individual judgment as well, a 100 per cent. perfection (agreement), is to place one's self along with the 100 per centers of other sorts. Even the smallest and most aptly chosen network of words (a statute), for the simplest and most kindred cases, almost invariably develops niceties which multiply so long as courts attempt to rest judgments upon the shadings of the words used. Language is just one of the numerous factors which should and ordinarily do control judgment, and the weight that should be given it is as variable as that given to any other factor. Legal science has much to gain from recognizing that problems for judges and juries can be stated in multiple forms, and that whatever form adapts itself to the demands of the particular court or particular problem is the best for the time and place. Such an attitude takes a great deal of the emphasis away from rules and doctrines, and places it on intelligent communication. It distributes the strain now placed upon stereotyped terminology over an entire vocabulary. If I may use an exaggerated but strikingly accurate figure to illustrate the point, I should say that lawyers, scholars and judges frequently broadcast the same subject-matter but on different wave lengths. It requires highly

selective receiving apparatus to eliminate the interference caused by the crowding. The problem may be to thin out the stations and promote the organization of systems on a large scale, but it certainly is not to reduce all broadcasting for all problems and all courts and all lawyers to a single system. For a beginning, I have long advocated the elimination of the "proximate" and "legal cause" network. It has sought to preëmpt wave lengths already in use; it interferes with too many better equipped stations; the service it attempts to render can better be handled from other points.

Several of the groups of cases which are both torts and crimes and which are dealt with in the phraseology of proximate cause are quickly passed in review. Take the case of X who has been given a mortal hurt by the defendant, but is later given a second fatal hurt by another person,[22] or by himself,[23] or by the treatment of a surgeon or physician.[24] In these cases there is no question of causal relation between the defendant's conduct and the death. The defendant's conduct was at least *one* of the material cause factors. Nor do the courts think otherwise. But does

[22] State v. Scates, 50 N. C. 420 (1858); People v. Fowler, 178 Cal. 657, 174 P. 892 (1918), Sayre, Cases on Criminal Law (1927) 183; People v. Ah Fat, 48 Cal. 61 (1874), Beale, Cases on Criminal Law (2d Ed. 1907) 340; State v. Wood, 53 Vt. 560 (1881).

[23] People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783 (1899), Sayre, op. cit. supra, note 22, at 189, Mikell, Cases on Criminal Law (2d Ed. 1925) 468.

[24] People v. Cook, 39 Mich. 236, 33 Am. Rep. 380 (1878), Beale, op. cit. supra, note 22, at 341; Thompson v. Louisville & N. R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146 (1890).

such conduct of the defendant amount to *murder*? In the case of a second fatal hurt by another person who may also have attempted to kill X, the North Carolina and Vermont courts hold that the first blow is not murder because the same man cannot be killed twice.[25] They stick in the meaning of the word "killed" as it is found in the statute. In construing the statute, they are guided solely by the words used, ignoring its purpose and other factors. I have found no tort case quite so narrow. But other courts would hold both the first and second assailant for murder, inasmuch as both clearly contributed to the death, although the hurt given by either would have been sufficient as a cause factor. The courts, in all sorts of cases, agree that the defendant does not escape responsibility because death is hastened by surgical or medical treatment.[26]

The case of the serious though not fatal wound, followed by some risk incident to treatment or other hurt,

[25] State v. Wood, State v. Scates, both supra note 22. The same problem is involved in such cases as Taylor v. State, 41 Tex. Cr. R. 564, 55 S. W. 961 (1900), Mikell, op. cit. supra note 23, at 473; Commonwealth v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705 (1863), Beale, op. cit. supra note 22, at 350.

[26] Regina v. Davis & Wagstaff, 15 Cox, Cr. Cas. 174 (1883), Sayre, op. cit. supra, note 22, at 185, Beale, op. cit. supra note 22, at 333; People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902 (1921); Sauter v. New York Cent. & H. R. R. Co., 66 N. Y. 50, 23 Am. Rep. 18 (1876); Note 8 A. L. R. 516 (1920) (particularly the modification made under the Texas Penal Code as shown by cases cited at 521); Barrow v. State, 17 Okl. Cr. 340, 188 P. 351, 9 A. L. R. 207 (Okla. 1920); Notes 39 A. L. R. 1268 (1925); 51 L. R. A. (N. S.) 877 (1914).

from which the injured person dies, gives greater difficulty. How far is responsibility extended in these cases? Causal relation is seldom doubtful in them and for all practical purposes it may be forgotten. So far as the giver of the first hurt is concerned, the problem is to discover what protection will be afforded the injured person against the risks which follow in the wake of the first hurt. The ordinary risks, as those arising from anæsthetics,[27] mistaken diagnosis,[28] infections,[29] self-inflicted hurts in delirium,[30] and many others,[31] are usually placed on the defendant. But the limits are rather quickly reached. If the injured person in the course of his treatment contracts some other

[27] Rettig v. Fifth Ave Transp. Co., 6 Misc. Rep. 328, 26 N. Y. S. 896 (1893) (death from shock). Contra: Mella v. Northern S. S. Co., 162 F. 499 (C. C. S. D. N. Y. 1908).

[28] McGarrahan v. New York N. H. & H. R. Co., 171 Mass. 211, 50 N. E. 610 (1898); State v. Daly, 210 Mo. 664, 109 S. W. 53 (1908); Note (1914) 48 L. R. A. (N. S.) 116.

[29] Armstrong v. Montgomery St. Ry. Co., 123 Ala. 233, 26 So. 349 (1891); Dickson v. Hollister, 123 Pa. 421, 16 A. 484, 10 Am. St. Rep. 533 (1889); Sullivan v. Boston Elevated R. Co., 185 Mass. 602, 71 N. E. 90 (1904); O'Quinn v. Alston, 213 Ala. 346, 104 So. 653, 39 A. L. R. 1263 (1925).

[30] Postal Tel. Cable Co. v. Hulsey, 132 Ala. 444, 31 So. 527 (1901); Daniels v. New York, N. H. & H. R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751 (1903).

[31] Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74; Id., 61 Md. 619, 48 Am. Rep. 134 (1883); Wallace v. Pennsylvania R. Co., 222 Pa. 556, 71 A. 1086, 128 Am. St. Rep. 817 (1909); Hirte v. Eastern Wisconsin R. & Light Co., 127 Wis. 230, 106 N. W. 1068 (1906); Notes 48 L. R. A. (N. S.) 93 (1914); 8 A. L R. 506, et seq. (1920).

disease, as scarlet fever,[32] develops cancer,[33] or becomes insane,[34] or the physician or nurse makes a very extreme mistake,[35] responsibility is frequently denied. Rules of any validity cannot be formulated here. Each case is too much its own. The courts attempt to use the foreseeability, or the natural and probable consequence test—a supposedly proximate cause formula—in both civil and criminal cases. This formula, for use elsewhere than as part of the technic for submitting a question of negligence to a jury,[36] would be beneath honest discussion were it not taken so seriously by many courts. It seems to be overlooked by those who put great faith in this formula that "proximateness" as a test of liability becomes, in turn, a major subject for determination. To determine "proximateness," therefore, we must have "probability." But "probability" itself must be determined, hence we employ "foreseeability" for that purpose. But "foreseeability" also must be determined, so we introduce the "ordinary

[32] Bush v. Commonwealth, 78 Ky. 268 (1880). Beale, op. cit. supra, note 22, at 342.

[33] Allison v. City of Fredericksburg, 112 Va. 243, 71 S. E. 525 (1911), 48 L. R. A. (N. S.) 93 (1914).

[34] Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249, 26 L. Ed. 1070 (1881); Salsedo v. Palmer, 278 F. 92 (C. C. A. 2d, 1921), 23 A. L. R. 1262 (1923); cf. Gasperin v. Consolidation Coal Co., 293 Pa. 589, 143 A. 187 (1928) (workmen's compensation case).

[35] Purchase v. Seelye, 231 Mass. 434, 121 N. E. 413 (1918), 8 A. L. R. 503 (1920). But see Wagner v. Mittendorf, 232 N. Y. 481, 484, 134 N. E. 539, 540, 20 A. L. R. 520 (1922).

[36] Green, The Negligence Issue (1928) 37 Yale L. J. 1028.

prudent person." But he must be defined and oriented by the "circumstances of the particular case" before he can do his work. Thus each test must in turn have its own test until the question to be decided becomes completely obscured. Nothing more is done under this formula, as used at this point, than to state in the crudest fashion the question of responsibility or no responsibility. It is a very poor way of saying that somebody must pass judgment on the case. Whoever that somebody may be, trial court, jury, or appellate court, he will "foresee" as far as, and no further than, his own intelligence permits him. But this constantly expanding extravagant rigmarole about proximate cause and probable consequences has apparently so ensnared most judges that they have surrendered their independent power of judgment to it, in so far as that can be done while still leaving them able to reach a decision in the particular case. It is true that, under enlightened use, this formula need not get in the way, as it can be stretched to cover any end desired; but, on the other hand, it is subject to much abuse and may divert attention so widely from the problem involved that it has become one of the most hurtful influences in tort law. Both its vice and its virtue lie in the fact that it may count for anything or for nothing. Its function is similar to that of a joker in the game of poker.

In cases of minor hurts the extent of responsibility is still more strictly guarded. Courts do not relieve defendants from all the incidents of treatment and infections,[37]

[37] Examine: People v. Kane, 213 N. Y. 260, 107 N. E. 655, L. R. A. 1915F, 607, Ann. Cas. 1916C, 685 (1915); Tibbs v.

but in most instances they do from the serious ones, as well as from other risks, although causal relation is perfectly clear.[38] The field is open here, as in cases of more serious hurts, and there is no possibility of stating rules which will give judgment much guidance in deciding these cases.

In the type of case in which death or other physical hurt is produced by fright, responsibility again falls far short of causal relation, so that it gives no trouble. But in which of these cases responsibility shall be imposed is not readily determinable. If the defendant is engaged in committing a serious crime, as an assault, and a third party is frightened to death by the violent manner of the assault, such has been held to be the basis for manslaughter.[39] A recent Tennessee case is most interesting. The defendant, in order to frighten the occupants of a canoe, shot in the water near it. One man jumped out and in doing so overturned the canoe. Two men drowned. The defendant was held guilty of manslaughter.[40] Likewise in most jurisdictions

Commonwealth, 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665 (1910); Note 8 A. L. R. 520 (1920).

[38] The limitations placed on responsibility by the doctrine of contributory negligence play a large part here. Note 48 L. R. A. (N. S.) 108 (1914).

[39] In re Heigho, 18 Idaho, 566, 110 P. 1029 (1910), 32 L. R. A. (N. S.) 877 (1911), Ann. Cas. 1912A, 138; Sayre, op. cit. supra, note 22, at 199; Regina v. Towers, 12 Cox Cr. Cas. 530 (1874). Beale, op. cit. supra, note 22, at 295, Mikell, op. cit. supra, note 23, at 460.

[40] Lemer v. State, 156 Tenn. 68, 299 S. W. 1049, 55 A. L. R. 915 (1927); cf. People v. Rockwell, 39 Mich. 503 (1878) (deceased knocked down by defendant and then stepped on or kicked by horse).

recoveries are allowed in tort for physical hurts received through fright. At least any difficulty from a question of causal relation has been eliminated in these cases.[41] But the courts have not gone very far.[42] Once it is recognized that a defendant may be held responsible criminally and civilly for hurts done through fright or other emotional disturbance, rules have done about all they can to control the judgments of judges and juries in the particular case. Rules of proximateness, remoteness, or foreseeability, as elsewhere, do more to confuse than they do to clarify. The more simply the problem can be stated, the more intelligent the judgment, and probably also the more acceptable.

Another group of causation cases in which causal relation is clear, but responsibility is not, includes the "nuisance cases." The defendant maintained a pig pen, but its odor alone was not a nuisance except in combination with the odors from his neighbors' pens.[43] In another case the de-

[41] Bohlen, Right to Recover for Injury Resulting from Negligence without Impact (1902) 50 Am. L. Reg. 141; Goodrich, Emotional Disturbances as Legal Damage (1922) 20 Mich. L. Rev. 497; Throckmorton, Damages for Fright (1921) 34 Harv. L. Rev. 260, Selected Essays on Torts (1924) 303; Green, The Duty Problem in Negligence Cases (1928) 28 Col. L. Rev. 1014.

[42] Commonwealth v. Couch, 106 S. W. 830, 32 Ky. Law Rep. 638, 16 L. R. A. (N. S.) 327 (1908). But cf. St. Louis Southwestern R. Co. of Texas v. Alexander, 106 Tex. 518, 172 S. W. 709 (1915); Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577 (1899); (1927) 36 Yale L. J. 1148; (1928) 38 Yale L. J. 68.

[43] Gay v. State, 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707 (1891), Sayre, op. cit. supra, note 22, at 188, Beale, op. cit. supra, note 22, at 349.

fendant's mine discharged refuse into a small creek. Many other mines did the same in other small creeks. A landowner on a river below the conjunction of these several creeks was injured by the deposits of this refuse on his land. There are some very important cases of this class, in which the plaintiffs have been denied recovery against a single defendant because it could not be shown to what part of the harm his conduct contributed.[44] It is clear that the defendant's conduct was a material factor in the result, but to what extent cannot be shown. Nor do all courts stop to find out the extent of contribution so long as it is appreciable.[45] Some one must bear the risk. Must it be the plaintiff who cannot single out any defendant quantitatively, or must the risk be placed on any one or more whom the plaintiff may sue? In criminal cases the courts consistently find for the defendant. But should that be so civilly? Or is a generalization desirable here either way? Should not the case be deliberately left open for individual treatment? Whatever solution may be offered, it cannot be found in any rules of causation, despite the narrow theology found in the opinions of the court.[46]

[44] Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265, 9 A. L. R. 933 (1920); Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N. W. 390 (1924), 35 A. L. R. 396 (1925). There are many interesting cases collected in the A. L. R. notes.

[45] Notes 9 A. L. R. 944 (1920); 35 A. L. R. 411 (1925).

[46] Both the West Virginia and Wisconsin courts turn their decisions on the distinction between consequential and direct injury. (1920) 29 Yale L. J. 935; (1904) 4 Col. L. Rev. 367; (1920) 27 W. Va. L. Q. 200.

The most extensive and most difficult class of crime cases with which the courts deal in terms of causation are those in which a defendant, while violating a penal statute, incidentally and unintentionally kills some one. The courts were quick to say that if a defendant, while doing an *unlawful* act, kills another, he is responsible for some grade of homicide, as well as for damages. As long as the unlawful act is a serious offense, this rough rule works fairly well. But when the unlawful act involves a minor police regulation, the rule does not work so well. And despite the employment of other rough devices as *malum in se, malum prohibitum* and *negligence per se,* the difficulties still persist.

Potter v. State [47] is illustrative of hundreds of such cases. The defendant was carrying a concealed weapon in violation of a statute. He and *X* became engaged in a friendly scuffle, the pistol was discharged, and *X* was killed. The Supreme Court of Indiana reversed a conviction of involuntary manslaughter. The court correctly stated the question:

"* * * did carrying the weapon unlawfully at the time of the homicide * * * render the accused guilty of the crime of involuntary manslaughter as charged in the indictment?" [48]

The statute defining manslaughter was as follows:

[47] 162 Ind. 213, 70 N. E. 129, 64 L. R. A. 942, 102 Am. St. Rep. 198, 1 Ann. Cas. 32 (1904), Sayre, op. cit. supra, note 22, at 177; cf. State v. Trollinger, 162 N. C. 618, 77 S. E. 957; 1 L. R. A. (N. S.) 991 (1913).

[48] Supra, note 47, at page 215, 70 N. E. at page 130.

"Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. * * *" [49]

Ignoring the question-begging word "unlawfully" in the first clause, the court was caught here in the words of the statute. The defendant was doing an unlawful act in carrying a concealed weapon and a bullet from that very weapon killed the deceased. But instead of working out an adjustment between the two statutes involved, the court translated its problem into terms of causation. It does this by a rhetorical question and answer about a different case. It says:

"If appellant, instead of carrying the pistol in question concealed, had been hunting with the weapon on Sunday in violation of the above statute, and when so hunting he had accidentally discharged it and killed Garnett, who happened to be standing near by, could it, in reason be asserted that his death was due to appellant's unlawful act of hunting on Sunday? Certainly not." [50]

Passing over the doubtful answer the court gave to its own question, it continues:

"With equal reason and force it may be asserted that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act

[49] Burns' Ann. St. Ind. 1926, § 2416.
[50] Supra, note 47, at page 217, 70 N. E. at page 131.

did not, during the scuffle between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful." [51]

And thus the court most ingenuously eliminated the significance of the most material cause factor in the case. This method of refusing to deal with the case before it by substituting a different case is one of the most usual devices employed by judges. It is likewise the most deceptive and in the long run the most hurtful. Try as it could, the court could not honestly get rid of the case as it happened. The defendant was carrying a concealed weapon and, while doing that act, the weapon he was carrying in violation of law produced the death of the third party. What might have been done if the Sunday law had been violated, or what might have been done had the weapon been lawfully carried were not even pertinent arguments on the question of causal relation. They may or may not have been pertinent to the question of responsibility. The important thing about the decision in this case is that the defendant was held not responsible. After all, this was the question that the court was attempting to solve.

In a case before the North Carolina court [52] two years later, the defendant was charged with manslaughter for killing X, whom he mistook for a turkey. The basis of the charge was the unlawful act of hunting on land with-

[51] Supra, note 47, at page 217, 70 N. E. at page 131.

[52] State v. Horton, 139 N. C. 588, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818, 4 Ann. Cas. 797 (1905). Cf. Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362 (1873).

out a license. The court held the defendant not guilty as the statute he violated was *malum prohibitum* and not *malum in se*. It avoided the difficulties of proximate cause. Incidentally the court, in two or three sentences, said that the hunting statute was not designed to prevent homicide.

The Vermont court [53] recently held the defendant responsible to the plaintiff for the accidental shooting of the plaintiff while both were hunting on Sunday. The court found sufficient basis of responsibility in the unlawful act of hunting on Sunday. The same court some years previous held that a plaintiff could not recover under an accident policy for an injury received by slipping on plowed ground while returning from a hunting expedition on Sunday. The policy exempted the insurer from liability in case of a violation of law [54] and the plaintiff had violated the statute both as to hunting and as to traveling on Sunday.

Few courts are so literal as the Vermont court, for in many other hard cases in which defendants have been prosecuted for homicide on the basis of having killed a person accidentally while violating some police regulation,[55]

[53] White v. Levarn, 93 Vt. 218, 108 A. 564, 11 A. L. R. 1219 (1918), Wilson, Cases on Torts (1928) 338.

[54] Duran v. Standard Life & Accident Ins. Co., 63 Vt. 437, 22 A. 530, 13 L. R. A. 637, 25 Am. St. Rep. 773 (1891). Cf. Dervin v. Frenier, 91 Vt. 398, 100 A. 760 (1917), Wilson, op. cit. supra, note 53, at 342 (in which it was held that the defendant's driving without a license was a mere condition and not a cause of the hurt of the plaintiff who was run over).

[55] Dixon v. State, 104 Miss. 410, 61 So. 423, 45 L. R. A. (N. S.) 219 (1913); State v. Budge, 126 Me. 223, 137 A. 244, 53 A. L. R.

or in which recoveries have been sought under accident policies exempting the insurance company from liability if the insured was engaged in an unlawful act at the time of his injury,[56] or in suits for damages in which defendants have sought to invoke the violation of some statute as contributory negligence on the plaintiff's part,[57] the courts have escaped from the difficulties of the situations by finding a lack of proximate cause.

Probably the most usual type of this group of cases is found in the harms done by automobile drivers operating cars with defective lights, at an excessive speed, without car or driver's license, on the left-hand side of the road, while intoxicated, transporting liquor, or in disregard of traffic signals or some other of the many regulations. If death results to the injured party, in most cases the defendant falls squarely within the manslaughter statute,[58]

241 (1927); People v. Campbell, 237 Mich. 424, 212 N. W. 97 (1927) (contributory negligence).

[56] Townsend v. Commercial Travelers' Mutual Accident Ass'n of America, 231 N. Y. 148, 131 N. E. 871, 17 A. L. R. 1001, 1005 (1921).

[57] Gilman v. Central Vt. R. Co., 93 Vt. 340, 107 A. 122, 16 A. L. R. 1102, 1108 (1919); Marland Refining Co. v. Duffy, 94 Okl. 16, 220 P. 846, 35 A. L. R. 52, 62 (1923); Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354 (1888); Speight v. Simonsen, 115 Or. 618, 239 P. 542 (1925), 43 A. L. R. 1149, 1153 (1926); Hansen v. Kemmish, 201 Iowa, 1008, 208 N. W. 277, 45 A. L. R. 498 (1926).

[58] People v. Cunningham, 64 Cal. App. 12, 220 P. 312 (1923); McDaniel v. State, 105 Tex. Cr. App. 468, 288 S. W. 1081 (1926); People v. Harris, 214 Mich. 145, 182 N. W. 673, 16 A. L. R. 910, 914 (1921). Cf. what this court says in People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902 (1921).

as well as within the *negligence per se* doctrine. Despite the numerous pronouncements to the effect that the defendant is responsible because he was engaged in unlawful conduct at the time, in the hard cases the courts find the usual means of avoiding these rules. The favorite escape is found in "proximate cause." [59] But the North Carolina court, as in the hunting case, again suggests a qualification of the rule which would seem worthy of greater emphasis. It says:

"It is generally held that where one is engaged in an unlawful and dangerous act, *which is itself in violation of a statute intended and designed to prevent injury to the person*, and death ensues as a consequence thereof, the actor is guilty of manslaughter. * * *" [60]

This distinction eliminates many cases. Sunday laws, licenses for cars, prohibitions against profane language and transporting intoxicants, parking regulations, and many others are probably not directed against physical violence. On the other hand, speed laws, requirements as to lights and brakes, prohibitions of driving while intox-

[59] Jackson v. State, 101 Ohio, 152, 127 N. E. 870 (1920); People v. Barnes, 182 Mich. 179, 148 N. W. 400 (1914); Note L. R. A. 1918B, 954 (1918); Howell v. State, 200 Ind. 345, 163 N. E. 492 (1928); Kimmel v. State, 198 Ind. 444, 154 N. E. 16 (1926); Gilman v. Central Vt. R. Co., supra, note 57; State v. Budge, supra, note 55; Notes 38 A. L. R. 1038 (1925); 43 A. L. R. 1153 (1926); also cases supra, note 47.

[60] State v. Whaley, 191 N. C. 387, 390, 132 S. E. 6, 8 (1926). The italics are the writer's. Cf. State v. Kline, 168 Minn. 263, 209 N. W. 881 (1926); People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902 (1921); Note 27 A. L. R. 1180 (1923).

icated, and others do have the safety of the person in view. The New York Court of Appeals, in a case involving the violation of one of the health regulations which was relied on as a defense to an accident policy, has recently taken the same ground. "The Health Law was not intended to provide protection to insurance companies," it said.[61] The same idea is gaining wider and wider acceptance generally.[62] This is but a recognition of the fact that rules of law, statutory and otherwise, in so far as they have any validity, have, or should have, purposes back of them, and are probably best understood in the light of the functions they are supposed to perform, however hard it may be to define them.

But even this distinction, while a most valuable one, does not always make perfectly clear just what judgment should be reached in numerous hard cases. Suppose a speed law of six miles per hour, and that the defendant is driving seven, when a little child darts out in front of his car and is killed. Or take the case of the concealed weapon which is accidentally discharged. Clearly both these rules are designed to protect life, and life has been taken as a result, at least in part, of the violation of both. Most courts refuse to reach the apparently logical conclusion,

[61] Supra, note 56, at page 155, 131 N. E. at page 873; Corbett v. Scott, 243 N. Y. 66, 152 N. E. 467, 46 A. L. R. 1064 (1926).

[62] Shelden v. Wichita R. & Light Co., 125 Kan. 476, 264 P. 732 (1928); Borenkay v. Robinson & Carpenter, 247 N. Y. 365, 160 N. E. 400 (1928), Wilson, op. cit. supra, note 53, at 240; (1928) 38 Yale L. J. 124; and see extended discussion of Peaslee, C. J., in Johnson v. Boston & M. R. R., 83 N. H. 350, 143 A. 516, 61 A. L. R. 1178 (1928).

and rightly so. Here a fact is driven home which we consistently refuse to accept. Rules cannot be made which will take the place of judgment, and the refusal to accept this fact compels judges to invent all sorts of devices by which to escape. Rules will carry those who must pass judgment only so far, figuratively speaking, into the neighborhood of the problem to be passed upon, and then the judges must get off and walk. The clear cases do not require rules. Even laymen can decide easy cases. Nevertheless it is in these that most of our rules find their parentage. We have them in abundance where we need them least. But in hard cases, rules or no rules, courts cannot escape a decision. It is frequently difficult in these cases to narrow, in terms of any generalization, the questions to be decided, and it is a false notion to think that the judicial process requires that this be done. Rules are a means to an end, and it is as important to know when they give no aid as when they aid. And while it is true that to trust to judgment alone will result in neither uniformity of judgment nor uniformity of expression, it is also true that neither should be expected or desired. Any uniformity that rules seem to give in either respect is illusory. The factors which control judgment here are at large. If I could believe that judges were resorting to "proximate cause" merely to save their faces in these cases, I should have a great deal of admiration for their ingenuity. But no one can read many of the opinions in which this doctrine is given a place without feeling that many judges give to it the same sanctity that young children give to Santa Claus.

My only suggestion here is that the judicial process, in all except the plainest cases, should be left as free of restrictions as possible. It is made up of judge and jury who have the guidance of general formulas in terms of statutes and broad common law rules. These formulas are primarily useful for stating the question to be solved in the particular case. However aptly or inaptly it may serve the function, some formula must be employed for this purpose. Then a concurrence of judgment both of judge and jury is required before the defendant is required to pay. In turn, this judgment is articulated in terms of deductions made from the formulas employed in stating the question. But this articulation in most cases is exceedingly poor. The courts seem unable to rise above the distressingly inadequate and excessively used terminology of medieval morality. The legal theory on which the administration of both crimes and torts depends is wretchedly inadequate. Legal scholarship has no more exacting obligation than at this point. And the hopeless thing about it all is that legal scholarship seems primarily interested only in resuscitating what is already dead. The hope that the judgments of judges and juries could be subjected to control through smooth phrases was probably the lawyer's first dream. It is apparently one that he cannot forget. And, doubtless, the story of the development of legal science through these centuries of word-serfdom will be as hard to believe as that some of the other sciences found their way up through sorcery and alchemy and astrology.

Two recent cases illustrate the hopelessness of changing the emphasis from legal theology to one of rational judg-

ment. In *Henningsen v. Markowitz* [63] the defendant had sold a 13-year-old boy an air rifle in violation of a statute. The boy's mother sent him back with the rifle, but the defendant would not accept it. The mother then took the rifle and hid it. This was in December. The following June the boy and a companion found the gun and the companion was shooting it at a target when the plaintiff, an infant, received the shot in his eye. The defendant was convicted for the violation of the statute. In addition the plaintiff recovered $20,000 damages against the defendant. The court in its opinion resolved the problem of the defendant's responsibility into one of proximate cause. But before it launched into that discussion, it made this interesting introductory holding:

"The legislative purpose in enacting these sections of the Penal Law is manifest. It was to prevent just such an occurrence as here happened." [64]

What else was there to decide? It would be thought that, having found that the defendant violated his duty under a positive law made for the protection of the plaintiff against the very sort of risk that had caused him hurt, the court would have been satisfied. But not so. It still felt that there was an issue of proximate cause to be passed upon, although the defendant's conduct as a material factor in the result was as clear as the statement of facts could make it. Let the court tell its own story:

"The most serious question presented, however, is

[63] 132 Misc. Rep. 547, 230 N. Y. S. 313 (1928).
[64] Id., 132 Misc. Rep. 548, 549, 230 N. Y. S. at page 314.

whether or not the conduct of Richard's mother does, as a matter of law, rescue defendant. It is urged that the possession by Mrs. Kevans, being a legal possession, brought to an end the incidence and effect of defendant's tort. It is intimated that while defendant would have been liable if the gun had been merely laid aside and after a period of 6 months used by these boys, Mrs. Kevans' possession during that period of time required an additional act on the part of Richard to bring it again into his possession, and that the force of causation was thereby broken. * * * The conclusion of Professor Beale (33 Harv. Law Rev. 633, 651) has been frequently cited as a concise statement of a governing rule, viz.: 'On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act.'

"Here in my judgment the active force did not in *legal contemplation* come to rest. Defendant's wrongdoing continued to be *potentially active* so long and whenever the infant purchaser obtained access to the dangerous implement, constituting in itself a force which defendant had set in motion." [65]

There are many significant things about this case. First, let me say that I concede that if any one can successfully formulate workable rules of causation, it is Professor Beale. But Professor Beale cannot insure what judges

[65] Id., 132 Misc. Rep. 549, 550, 230 N. Y. S. at page 315. The italics are the writer's.

will do with his rules after he has formulated them. I am of the opinion that Professor Beale would not stand for any such use of his rule as was made in this case, for in the same article from which the rule is quoted by the court, and in talking about the very same cases as the type here involved, he says:

"It is to be noticed, that if the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it." [66]

In short, if the taking of this gun by the mother and keeping it in successful seclusion for six months was not a "coming to rest in a position of apparent safety," whereupon the defendant's conduct "ceased to be an active danger," it would be impossible to imagine one. If Professor Beale's rule means anything it means that the defendant was not the proximate cause in this case. The court felt that the rule did mean something, but it also felt that the plaintiff should recover. Therefore it resorted to the same judicial magic which has been resorted to in hundreds of cases, when it said "the active force did not in *legal contemplation* come to rest," and that it continued to be "*potentially active.*" This merely means that the rule can be stretched to mean what the courts may want it to mean. But these terms of elastic fiction completely destroy the

[66] Beale, The Proximate Consequences of an Act (1920) 33 Harv. L. Rev. 633, 656.

integrity of the rule itself. Such has been the shabby fate of every rule of causation which has been formulated.

But the judgment is a most acceptable one, from my point of view at least, and was sufficiently justified when the court decided that the defendant had violated a statute made to protect the plaintiff from just the sort of thing that had happened to him. All the remaining talk is merely the result of the bad habits of the judiciary generally. Fortunately the judgment of the particular judge was stout enough to wreck a rule while seeming to accept it. Many other judges might have surrendered before such authority.

In *Johnson v. Boston & M. R. R.*[67] the New Hampshire court delivered one of the most interesting decisions of the year. There was a collision between the defendant's train and the plaintiff's automobile at a crossing. A statute provided that: "No person shall operate a motor vehicle upon any way in this state unless licensed." [68] The plaintiff had no license and was nonsuited on the ground that, being a wrongdoer himself, he could not maintain suit against the defendant for its negligence.

Quite unlike most courts, the New Hampshire court quickly conceded that there was no lack of causal relation.[69] On the other hand it recognized that the question was a far more significant one. It said:

[67] 83 N. H. 350, 143 A. 516, 61 A. L. R. 1178 (1928).

[68] Id., 83 N. H. 351, 143 A. 517; Laws 1921, c. 119, § 8.

[69] "The argument that lack of license is not causal and that therefore the violation is immaterial ignores the terms of the statute, puts the facts upon which the prohibition depends in

"The question thus raised is not really one of causation. It is evident that the plaintiff's act of driving the car was causal. * * * The issue here is whether the law makes the plaintiff accountable for such causation. * * * The whole matter resolves itself into a question of legislative intent." [70]

In discovery of the legislative purpose, the court said: "It is self-evident that the chief object of the statute is to protect other users of the highways.[71] * * * The moving purpose was the protection of travelers.[72] * * * The reason for this prohibition is that driving by the unfit is dangerous. * * * Moreover, it is matter of common knowledge that more rather than less restriction upon motor vehicle operation is needed for the protection of the traveling public.[73] The plaintiff's act in driving without a license is a wrong against third parties because the legislature has so provided." [74]

Thus the court declined to allow the plaintiff to recover for the negligence of the defendant because of the plaintiff's own wrong. It looks like irrefutable logic based on

the place of the things prohibited, and thus reaches a conclusion based upon false premises." Id., 83 N. H. 360, 143 A. 521. "The Plaintiff's act of operating a car was causal in the strictest sense. It was not his mere presence on the highway, but his operation of the car, which brought him into the collision." Id., 83 N. H. 364, 143 A. 523.

[70] Id., 83 N. H. 359, 143 A. 521, 523.
[71] Id., 83 N. H. 351, 143 A. 517.
[72] Id., 83 N. H. 363, 143 A. 523.
[73] Id., 83 N. H. 362, 143 A. 522.
[74] Id., 83 N. H. 363, 143 A. 523.

sound premises. And it is possible that the court's judgment coincided with what it considered to be the legislative judgment. But, assuming that the court only reached such a judgment because it felt impelled by the legislative judgment to do so, did it not stop short in its inquiry into the "legislative intent"? Let what I have already said be repeated here. The statement of the problem in terms of the purpose of the rule does not necessarily make it easy of solution. It does make the problem more graspable and hence more rational. The statute was doubtless designed, as the court says, to furnish other travelers on the highway the protection indicated. But was it designed to protect railroads from their negligence at crossings? To put it differently, was the court's minor premise correct that the train at the crossing was a traveler in terms of its major premise? It is true that in one sense the train of the defendant in crossing the highway was a traveler on the highway, but would the legislature have ever considered such a statute for the protection of railways? Was this sort of collision among the hazards at which the statute was directed? And would the court have been going far afield to have limited the plaintiff's duty under the statute to the general pedestrian and vehicular traffic of the highway? It may well be that the court in this case successfully eluded the pitfall of proximate cause to be caught in one of the logical snares involved in determining the "legislative intent." Possibly also the court, in its efforts to determine the scope of the statute, failed to consider other factors of more importance.

Allow me to make the point again that the general rule, whether it is your general rule or mine, is dangerous. Judges frequently insist on riding a general rule to the bitter end. If a plaintiff be guilty of contributory negligence by violation of a statute in one case, as against one person, he is in all cases, whether the statute was designed to cover that case or not. Judges must have universals and absolutes. Such is and has been the mournful state of legal theology. And, when the judicial process is so indoctrinated, a good general rule, as well as a poor one, may be made to do hurt. The only antidote lies in a revolt from the supremacy of rules.

JUDGMENT HAMPERED BY RULES OF CAUSATION

Are there any differences between the rules of causation in crimes and in torts? Such an inquiry has little place in any system of legal theory which deserves respect. First, there are no rules of causal relation used or required in any legitimate sense of that term, either in torts or crimes. *Causal relation* can be reduced to no lower terms. Second, in determining the extremes of legal protection—the problem which is hidden under the causation terminology—the sweep of judgment quickly passes beyond the reach of any rules that can be framed. And what is more, the judicial process in these cases ought to be left free of hampering restraints in fixing the limits of protection in the particular case. If there is to be any rule, this rule of freedom of judgment should be the rule both in torts and crimes. It is all that we have to depend upon. But rules

or no rules, the bounds of legal protection are hard to draw. In one case it may make the factors that should control judgment clearer to state the problem as one of statutory construction, legislative intent, interpretation; in others it may look easier to state the problem in terms of ends and functions; in still others, where the lines are drawn the closest perhaps, all that a court can do is to focus attention upon the very risk in question and ask whether it should be placed upon the one party or the other. In the clear, easy cases, where the path has been marked time and time again, it is well enough to consider these problems in terms of "rights and duties." Certainly some such stabilized symbolism as the last is desirable wherever judgment can be made automatic or even nearly so. But in no instance has a place been found for rules of causation. The phraseology of causation has been found to lend itself to learned dissertation about any situation which the judges do not understand. It has never afforded a glimmer of light on any problem a court has had to decide, nor does it provide the slightest articulation for any judgments courts have passed. It has served but one useful function, and that has been to give the judges a dependable way out of difficult situations when they have made up their minds but either do not know how, or else do not take the time, to articulate their conclusions on a rational basis. Judging from the use that has been made of it, it has served this function well. There is little probability that the courts will knowingly surrender such a useful and safe means of escape.

It may be objected that, conceding all that has been said, the problem, which is usually considered under terms of causation, is not solved when it has been translated into other forms of statement. That is a valid observation. And what is more, nothing can be done about it. No one has yet succeeded in making any word scheme do the service of judgment on any large scale. Nor has any one isolated and reduced to control the factors which direct and control judgment in general. Nothing is clearer than that these factors differ from case to case, even in torts, as well as in crimes, and vary even more from torts to crimes. There are frequently difficulties of administration on the criminal side of the docket where there are none on the civil side, or *vice versa*. Economic considerations may weigh heavily on one side or the other. Ethical influences may and do fluctuate from case to case. The risk itself may be one so unusual that there is no need of a strict responsibility generally, but in the particular case may be so exacting that the defendant should pay both the penalty and the damages. I am of the opinion that courts, first and last, sense these factors, even though vaguely at times, and even though the thick mists of their terminology are hard to penetrate.[75] But I insist that they need to be brought out

[75] "The moral element (Derosier v. New England Telephone & Telegraph Co., supra [81 N. H. 451, 130 A. 145 (1925)]) and the inherent justice, sometimes called reasonableness (Cavanaugh v. Railroad, 76 N. H. 68, 79 A. 694 [1911]; McCaffrey v. Concord Electric Co., 80 N. H. 45, 52, 114 A. 395, 17 A. L. R. 813 [1921]; Stanley v. Kimball, 80 N. H. 431, 433, 118 A. 636 [1922]; Tullgren v. Company, 82 N. H. 268, 271, 133 A. 4, 46 A. L. R. 380

into the open and talked about in as plain terms as can be employed. Though it may be conceded that somehow or other the judicial process gets an unbelievably large amount of its work done acceptably, there is no possibility of its successfully meeting the exactions of hard cases until it is recognized that the judge, in finding a basis for judgment, must go beyond and above any range for which rules have yet been fashioned. This does not mean that the individual judge cannot learn much from what other judges in other cases have done and said, or that juries cannot be aided by intelligent instructions. These may still be pressed; they are valuable means of educating judgment, but that is as much as they can do in these hard cases. Neither good administration nor the progress of law at this point lies in authority of any sort. Legal science needs rather the power to discern the factors at work in the particular case, and the power to pass acceptable judgments for the time and place. These powers are not developed except by their employment. They have been in large part effectually blocked by so-called rules of causation, and thus, in addition to being worthless, these rules are hurtful.

[1926]), of the imposition of accountability, have often been the controlling factors." Id. 83 N. H. 359, 143 A. 521.

See my article on The Duty Problem in Negligence Cases, supra, note 20, in which I have attempted to identify the more important factors which control the judgment of courts.

CHAPTER 7

MAHONEY v. BEATMAN: A STUDY IN PROXIMATE CAUSE [a]

The very able attempt of the Supreme Court of Connecticut, the majority speaking through Chief Justice Wheeler, the minority through Justice Maltbie, in the recent case of *Mahoney v. Beatman*,[1] to deal rationally with the concept of "proximate cause," warrants a consideration of that question as involved in this specific case. The Connecticut court through its Chief Justice is contributing so much to the restatement of tort law by the American Law Institute that any disagreement with the views of the court must be and is stated with the greatest deference. The development of the case well illustrates a point often insisted upon, i. e., that there is no *one* way of stating in terms of legal theory a desired conclusion. Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment.[2] The only purpose further discussion can serve is to simplify the statement of theory so that it may not thwart judgment, nor make the articulation of judgment seem too strained.

The case is not unusually complex. The trial court found that the defendant while proceeding northerly drove

[a] This comment was first published in 39 Yale L. J., 532 (1930).

[1] 110 Conn. 185, 147 A. 762 (1929).

[2] See my Analysis of Torts Cases (1929) 35 W. Va. L. Q. 323, for further elaboration.

his car across the center of the road and onto the left hand side, so that the plaintiff who was driving rapidly in the opposite direction was forced off the concrete onto the shoulder of the road. Despite this giving of ground, the defendant's car struck the hub of the left front wheel of the plaintiff's car. The plaintiff's chauffeur lost control of the car and it swerved in a circle to the left and crashed into a tree and stone fence on the opposite side of the road. The trial court stated the following conclusions: "(1) The defendant's car was on the wrong side of the road. (2) The speed of the plaintiff's car was unreasonable but it did not contribute to the collision which was due entirely to the negligence of the defendant. (3) The speed did, however, materially hamper the plaintiff's chauffeur in controlling the car after the collision, and owing to it he completely lost control of it. (4) Since the court was unable to find from the evidence the amount of damage caused at the time of the impact, the court found the plaintiff entitled to 'nominal damages,' which were assessed at $200."

The points of conflict are developed by a process of elimination:

(1) *The respective duties.*

(a) The defendant was under a duty to use reasonable care to keep to his side of the road so as not to interfere with other travelers' use of the other side of the road.

(b) The plaintiff was under a duty to drive his car at a reasonable speed and also to use reasonable care to avoid contact with other travelers, even though they might be on the wrong side of the road.

Where these duties are found, and why, are not pertinent inquiries here. That there were such duties is not questioned. It is merely suggested that the statement in the majority opinion that "probability of injury by one to the legally protected interests of another is the basis for the law's creation of a duty to avoid such injury," is not a sufficient statement of the basis of duties. Duties are governed by more comprehensive factors than the "probability of harm." [3] It is worthy of emphasis that the jury would have nothing to do with imposing such duties as are here involved. Such function is that of the court, in the absence of legislation. But legislation would not be of any peculiar significance in this case, inasmuch as the court would impose the same duties as the legislature would.

(2) *Violation of duty, i. e., negligence.*

(a) That the defendant violated a duty due the plaintiff seems not to be questioned. The evidence was all one way. There was nothing to go to a jury (or a judge sitting as a jury) on this point. In any event, the trial court's conclusion (1) was fully supported.

(b) The plaintiff also violated his duty to drive at a reasonable speed by driving at an unreasonable speed. This was found in the first part of conclusion (2). The plaintiff did not, however, violate his duty to use reasonable efforts to avoid contact with the defendant's car after it had crossed to the wrong side of the road. Indeed, the plaintiff's car turned out upon the shoulder of the road.

[3] See for more extended discussion my article, The Duty Problem in Negligence Cases (1928) 28 Col. L. Rev. 1014, 1026.

Did the violation of duty by the plaintiff in driving at an unreasonable speed constitute contributory negligence so as to defeat recovery? This is left for later discussion.

(3) *Damages.* There is no question about the full loss suffered by the plaintiff. That is measured by the cost of repairs for which the plaintiff sought recovery.

(4) *Causal relation.* Was there causal relation between the defendant's violation of duty and the full damages suffered?

That there was such causal relation can not be disputed. But there were also two other causal factors of importance: (1) the unreasonable speed of the plaintiff's car, and (2) the loss of control by the plaintiff's chauffeur. Hence, there were *three* outstanding causal factors, all of importance. The trial court recognized all three factors, as disclosed by conclusions (2) and (3).

With this analysis of the case, upon what basis shall the plaintiff be permitted to recover? The points of conflict are reduced, by this process of elimination, to two, viz., (1) Does the plaintiff's own violation of duty defeat a full recovery? (2) Do the cause factors of excessive speed and loss of control defeat him?

Both the trial and appellate courts turned the case on the second point of conflict. The trial court (conclusion 3) held that the speed and loss of control by the chauffeur did bar the plaintiff from a recovery except for the damage done by the initial impact, while the appellate court held that these cause factors did not defeat the plaintiff, because

the defendant's violation of duty (driving on the wrong side of the road) was a *substantial factor* in the total result.

That the appellate court is correct in saying that the defendant's conduct was a *substantial factor* is unquestionable. It is quite as certain, however, that the excessive speed and loss of control were also *substantial* cause factors. It is here suggested that on the question of *causal relation,* the trial and appellate courts are at an *impasse.* If the question of *causal relation* were determinative of the case, the plaintiff could not win. But it is infrequent indeed that *causal relation* is a determinative issue. Courts do a wholly useless thing in 99 cases out of 100 in which they reduce the question to be decided to such a basis. In most cases it is clear beyond a doubt that there are multiple substantial cause factors, among which is to be found the defendant's conduct. In the absence of wrongful conduct on the plaintiff's part, the inquiry as to *causes* should end as soon as it appears that the defendant's conduct was a substantial factor. If the plaintiff's conduct, as in this case, is seen also to be a substantial factor, then some other basis for determination must be sought. The attempt to rest the decision upon differences in degree of causes is futile.

If the case can not be determined on a causal relation question, due to the fact that both the plaintiff's and the defendant's conduct are substantially operative in the total result, can it be resolved on the first question, viz., did the plaintiff's own violation of duty defeat him, so as to

make the plaintiff bear his loss rather than throw it upon the defendant? It is suggested that such is the determinative question in this case. It will be noted that the trial court found in conclusion (2) that the plaintiff's unreasonable speed did not contribute to the collision. It was on that basis that the court allowed a recovery for the damages caused by the initial impact. There are two objections to this conclusion: First, it is not true; second, the court obviously confused causal relation and responsibility. The plaintiff's unreasonable speed can not be removed from the case without making a new one, which was not before the court. The trial judge doubtless meant that the plaintiff's unreasonable speed *ought not* to relieve the defendant of *responsibility* for the initial impact. That is a different matter. But that the speed did in fact contribute to the collision can not be eliminated from the case without destroying the case as it was presented to the court. A second's difference in the plaintiff's rate of speed and the case would have been a different one. A physical fact as one of the data to be dealt with in a case ought never to be disputed; on the other hand, it ought to be accepted unflinchingly even though it impose great difficulty.

This erroneous conclusion happens to be of no significance. It is not the fact of *initial* collision which is in litigation, but it is the *completed* series, the total injury, the wrecked car of the plaintiff which cost $5,850 to repair. Did the unreasonable speed of the plaintiff contribute to this total loss? The trial court made a finding that such speed did contribute to the loss of control by the chauffeur

and thence to the total loss. Hence, we have the plaintiff's own negligence contributing *materially* (a synonym for *substantially*) to the full loss for which the plaintiff is seeking recovery.

How can the plaintiff escape the defense of contributory negligence? It is respectfully submitted that this was the question which the court had before it and that the court did not have before it any doubtful question of *causal relation*. This is the position taken by Justice Maltbie in his dissent. It is readily conceded, however, that when such a question as is here involved arises, courts habitually deal with it under the head of *proximate cause*. "Proximate cause" and "causal relation" have not even the remotest kinship. They present wholly different problems. Until that fact is recognized, it is believed that there can be no successful discussion of the cases. The use of the term "cause" sometimes leads courts to confuse the two. The substantial factor formula is useful only in ascertaining *causal relation*. It has no place in determining "proximate cause," as that term is used in the overwhelming number of situations.[4] To the extent that the majority opinion attempted to employ the "substantial factor" formula other than as a test of causal relation, it is of doubtful validity. The observation of importance, however, is that in whatever way the question as here involved is treated, whether as *contributory negligence* or *proximate cause*, it is a question of limitation upon the defendant's duty. It is

[4] In my article, Are There Dependable Rules of Causation (1929) 77 U. of Pa. L. Rev. 601, this point is elaborated at length.

thus a question for the *court* and not for the *jury*. Shall the fact that the plaintiff drove at an unreasonable speed which contributed to his hurt limit the defendant's responsibility under his duty not to cross on to the plaintiff's side of the road?

It is believed that the determination of the question depends upon the respective scope of the duties which the respective parties violated. The duty violated by the defendant was clearly for the protection of travelers using the other side of the road. He therefore should pay for the damage he caused the plaintiff unless the duty violated by the plaintiff—excessive speed—in some way limited the defendant's duty. Was this duty which the plaintiff violated imposed for the purpose of protecting the defendant while he was on the wrong side of the road? This would be the result if the defendant should not be made to pay. The majority of the court in effect answers the question in the negative. The idea is often expressed by the statement that "a person does not have to anticipate that another will violate his duty." The plaintiff is in a position to invoke this theory. Under his duty to the defendant not to speed, he was not required to take into account the risk that just as he was passing the defendant, the latter would turn on to the wrong side of the road. Thus the plaintiff's duty did not comprehend the risk which in fact he encountered. That is in substance the holding of the court.

It might be asked: Why will not the same theory work in behalf of the defendant? Was his duty not to drive on the wrong side of the road for the purpose of protecting

the plaintiff while he was speeding? If the defendant were suing the plaintiff, the inquiry would be pertinent upon the question of contributory negligence. In such a case, it is believed that it would be generally held that the defendant's duty not to turn into the plaintiff's path was to protect the plaintiff from a collision whether he was standing still, speeding, or what not. The defendant is thus not in a position to invoke the theory in question as a defense. His duty was to stay on his side of the road. He saw the plaintiff on the other side, probably appreciated the fact that he was driving rapidly, and instead of taking care to keep away he inadvertently turned into the plaintiff's path. The fact that the plaintiff was a wrongdoer himself did not thereby suspend the defendant's duty. If anything, the defendant's duty was all the more imperative as indicated by the "last clear chance" doctrine, which prevents defendants from having an "open season" upon plaintiffs who are caught in a negligent position.

Thus, the two duties have different scopes; they comprehend different risks. The violation of one can not be set off as a defense to the violation of the other, even though both violations admittedly contributed to the same result. An illustration may make the point clearer:

Suppose P is hunting on Sunday. While walking down the road with his gun, the defendant negligently drives his car so as to run over P. Can the defendant set up P's violation of the Sunday law as a defense? Most courts would say No, on the ground, confused though it be, that the violation of the Sunday law had nothing to do with the result

(was not a *proximate cause* of it).[5] While this gets the desired conclusion, it is poor theory. The violation of the Sunday law was a substantial cause factor in every sense of that term, but the two rules, the one which P was violating and the one which the defendant violated had different purposes and imposed duties on different planes, and even though P's presence is accounted for by his unlawful conduct on Sunday, such is no defense. The prohibition against hunting on Sunday was not designed to relieve the defendant from the responsibility in driving his car with reference to P, even though P was engaged in unlawful conduct while on the highway. Likewise, it can be said in the instant case that the prohibition against P's excessive speed was not designed to relieve the defendant from his negligence in driving over on P's side of the road so as to collide with P's speeding car. The point may well be a close one, but legal theories bring plaintiffs and defendants into just such close places when the facts of the case require it. It is believed to be better to face the situation, though a hard one, and deal with it rationally, even though the drawing of very close lines is required.

In this connection it is well to consider *Smithwick v. Hall & Upson Co.*,[6] relied upon by Justice Maltbie in his dissent. In that case the same sort of question was involved as in the present case, and the court likewise translated it into a problem of proximate cause. An analysis of this case heretofore made is pertinent:

[5] Id. 615 et seq.

[6] 59 Conn. 261, 21 A. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104 (1890).

"Plaintiff, an employee of defendant, ventured out on a part of a platform used in connection with an ice house where it was very dangerous to work. He had been warned not to work out there as he might fall or slip, and it being unprotected by railings he would be thrown below and hurt. While the plaintiff was out on this dangerous part of the platform, the brick wall of the building above the platform, in consequence of the negligence of defendant, gave way, the brick falling upon the platform where plaintiff was and thence to the ground. Plaintiff was struck by the brick and thrown to the ground. As a defense to a suit for his injuries, defendant invoked plaintiff's contributory negligence. The court spends considerable time speculating whether plaintiff's wrongful conduct had anything to do with his injuries, that is, whether it was 'one of the proximate causes and not merely a condition.' Finally the court concludes:

"'Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the *legal* cause of his injury, or make that act, from a *legal* standpoint, a contributing cause where it was but a condition.'

"In other words, not being able honestly to say that plaintiff's conduct was not one of the causes of his injuries, the court resorts to a fiction, 'legal cause,' which has often been employed in such situations, as a way out of the difficulty. This fiction is wholly useless if the prob-

lem is fully analysed. Fictions serve good purposes only when there is nothing better. They obscure rational thought process. Any 'constructive' or 'legal' or 'in law' device for reaching a conclusion is justly the subject of suspicion. The way out for the court in this situation is very clear. It is this. The rule (duty) that plaintiff violated (needlessly exposing himself to an unprotected platform) was not designed to relieve the defendant from its obligation owed to its employee to furnish him a reasonably safe place (building) about which to work. The purpose of the common law rule which plaintiff violated did not go that far; the hazard towards which it was directed was entirely different, to-wit, the hazard of slipping off an unprotected platform while engaged about his work, *not the hazard of being crushed under bricks from a collapsed wall of the building.* Plaintiff did not become an outlaw by being contributorily negligent. His negligence did put him in a dangerous place and contributed to his hurt. But irrespective of such causal relation, defendant's obligation as to the safety of the wall was in no wise affected. Plaintiff was still entitled to its protection. The court was called upon to define the scope of the respective rules involved. They could not be offset one against the other. If the rule which a plaintiff has violated does not give a defendant relief from an obligation owing plaintiff imposed by some other rule of law, then such contributory negligence, however clear a causal relation can be traced between it and plaintiff's hurt, affords defendant no ground of defense. The respective rights and duties of the par-

ties are turned on much more important factors than mere causal relations." [7]

So far in this discussion, the only thing which has been done is to rationalize a conclusion which the majority of the court reached and which the writer finds entirely acceptable. In order that each step could be followed, the discussion has been detailed. The statement of the analysis could be greatly abbreviated if it were not for the desirability of indicating the differences between this analysis and the court's analysis. It can be quickly formulated in terms of legal theory: Does the plaintiff's contributory negligence relieve the defendant from responsibility for the loss which the plaintiff suffered? A negative answer can be as quickly given, based upon the legal theory that the respective duties violated by the respective parties comprehend different sorts of risks and therefore one can not be offset against the other.

It will be observed that this rationalization tells little if any more as to the factors which control the conclusion than does the rationalization of the court disclose the basis of the court's conclusion. In both instances, the basis of judgment has been effectually concealed in terms of legal theory. Legal theory, however, is ordinarily sufficient for the purposes of lawyers, and that being true, the profession quickly comes to feel that it is legal theory which compels judgment, when as a matter of fact it merely articulates judgment. Hence the question, why make the

[7] My article, Contributory Negligence and Proximate Cause (1927) 6 N. C. L. Rev. 1, 17.

defendant pay for this loss rather than leave it where it fell, is still untouched.

If it were the judgment of the court that the plaintiff be denied recovery, legal theory would lend itself to that judgment with equal facility as it does to the judgment which the court actually gave. Under the theory of the trial court, the plaintiff would have contributed to the full loss; hence, he should recover only for the damage done by the first impact. Under the appellate court's theory, either the judge (or a jury) could have found substantial causal relation between the total loss and the original impact. Under the dissenting opinion the case could have gone back to the trial court for determination of the relation between the plaintiff's negligence and the total loss. Under the analysis here suggested, the court could say with good reason that the scope of the plaintiff's duty comprehended just such a risk as that of another traveler crowding the center of the road at the moment of passing, and that the duty of reasonable speed was to eliminate just such risks from highway travel. An opposite judgment in such a case could therefore be articulated in numerous terms, and as such be wholly consistent with sound legal theory. But however articulated, no particular method would tell the story of what determined the judgment. The factors which control judgment show dimly through the terminology of legal theory.

What then compels the conclusion that the defendant should bear the loss in this case? It is suggested, but with no insistence, that the factors of administration, morals (fault), and prevention of harm have very little part to

play. But it can not be said that they are entirely absent. The ease of administration forbids that the court enter upon the attempt to apportion the damages according to the degrees of fault. This is reflected in Chief Justice Wheeler's reliance upon Pollock's dictum in *Greenland v. Chaplin*.[8] It is the same idea that caused courts to reject the doctrine of comparative negligence which they felt involved the cumbersome idea of "degrees of negligence." Administration therefore requires that the loss be thrown as an entirety one way or the other, and to that extent it was a factor in this case.

The morality involved is almost equalized, owing to the fact that both the plaintiff and the defendant were law breakers. But not quite so. The inconsiderate handling of a powerful vehicle so as to come into the path of a like rapidly moving machine is of a little deeper dye than the excessive speeding of a machine along a paved country highway. To that extent the current notion of "fault" is involved in the case.

The prevention of harm as a general policy is reflected in both rules which were violated. Both are designed to reduce the number of traffic accidents. Any weight put upon one would call for an equal insistence upon the other. Hence, the preventive factor in a case of two motorists, both of whom have violated traffic rules, does not contribute anything of significance.

On the other hand, the economic factor, *i. e.*, the part that modern machinery and speed play in our everyday life,

[8] 5 Ex. 243 (1850).

would seem to have great weight. The current attitude in this direction in the matter of traffic is somewhat indicated by the removal of arbitrary speed limits by legislatures, especially in communities having good roads. Fast travel is an urgent demand of modern life. We dare not penalize it too severely.

Also the factor of capacity to bear loss plays a large part. It may be true in a particular case that the plaintiff is the owner of a Rolls Royce, while the defendant has a less costly machine, but the risks of traffic harms are so great under the best conditions and so easily shifted by insurance, that the courts reflect the general feeling that the operator of one vehicle who by its mismanagement interferes with that of another ought to bear the risk despite the fact that the person hurt may also be an offender in some other particular. The tendency toward insurance for all traffic harms without reference to fault is reflected more and more in traffic decisions. Since such harms are inevitable and can not be apportioned with precision on any basis of fault, both good administration and good economics would require that they be adjusted on some more practical basis.

These and other considerations are hard to focus, and courts are wise in refusing to deal with them in an open fashion except where they are very clear and exacting. Nevertheless, the fact that such considerations in varying complexity do influence the judgments of courts as well as other citizens ought to be accepted on all hands. Likewise, the value and functions of intellectual machinery, such as the negligence network of theories through which

to articulate such judgments without the necessity of disclosing the difficulties of arriving at them, should be recognized. The acceptance of such a viewpoint takes much of the load off legal theory and permits a tolerance towards the articulation of judgment which is not greatly disturbed by the fear that the integrity of any particular brand of legal theory is thereby threatened.

In concluding, it is well to note that Chief Justice Wheeler observes with great force that much of the reasoning indulged in by legal writers is too abstruse to submit to a jury. That observation is valid, but the saving point is that it is seldom, if ever, required that the questions involving such abstruse reasoning shall be submitted to the jury. Such matters are ordinarily for the court, as is true in this very case. The jury questions in a negligence case are relatively simple. Certainly, juries have nothing to do with imposing duties or defining them. Their functions come in passing on the issues of negligence, causal relation and damages.[9] The practice of submitting "proximate cause" to the jury is usually both erroneous and futile. It is *erroneous* because most courts when they talk about proximate cause are dealing with some phase of the duty problem and not causal relation. It is *futile,* inasmuch as the proximate cause formula is the same formula as the negligence formula, but phrased in slightly different words. The usual result is that the issue of negligence is merely submitted twice in the same case, once in terms of negligence and again in terms of "proxi-

[9] See the formula developed in my article, op. cit. supra note 2.

mate cause." Both variations of the formula are based on "foreseeability of harm by the man of ordinary prudence." Even where the courts hold there is no negligence issue, as in the case of the violation of a statute, they nevertheless sometimes submit that issue under the guise of "proximate cause." Any close analysis of the two formulas will reveal their identity.

The outstanding contribution in the case under discussion is the approval the court gives to the "substantial factor formula" devised by Jeremiah Smith as a means of getting a jury's verdict on the issue of causal relation. While such issue seldom arises when it does arise it properly falls within the functions of a jury. The formula is steadily gaining headway as a means of translating the problems of causal relation to the jury for determination.

CHAPTER 8

THE PALSGRAF CASE

In *Palsgraf v. Long Island Railroad Company*, plaintiff was a passenger waiting on the platform for her train. Two other passengers attempted to board a train which was pulling out of the station. The trainman on the latter train aided the two passengers to board it. One of the passengers was carrying a bundle which contained fireworks, but the fact that the bundle contained fireworks was not known to the trainman. In boarding the moving train, the package dropped and the fireworks exploded; the concussion knocked down a platform scale some distance away, which fell upon the plaintiff. The case was submitted to the jury on the issue "whether the defendant employees were careless and negligent in the way they handled the particular passenger after he came upon the platform and while he was boarding the train." Verdict was for the plaintiff, and judgment for $6000 was rendered in her favor, which was affirmed by the Appellate Division, two judges dissenting.[1] The judgment was reversed in the New York Court of Appeals by a four to three decision, and the complaint was ordered dismissed.[2]

The case is a close one, and the variety of legal theories employed by the several appellate judges handling the case makes it a good one for the study of the judicial process.

[1] 222 App. Div. 166, 225 N. Y. S. 412 (1927).
[2] 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

The plaintiff, the trial court, and the majority of the Appellate Division thought the only serious question was one of negligence. Having assumed that plaintiff, as a passenger waiting for her train, was "entitled to have the defendant exercise the highest degree of care" for her safety, the problem, as they conceived, was whether this duty had been violated—a question for the jury. The defendant and the dissenting judges in the Appellate Division, so far as shown by the reports, did not question this duty and its violation, but thought the vital question was one of proximate cause and that the court should find for defendant on that question.

The majority of the Court of Appeals, speaking through Chief Judge Cardozo, does not clearly articulate whether they consider the problem one of duty or its violation. They conclude that defendant's conduct "was not a wrong in its relation to plaintiff." They also say, "the risk reasonably to be prevented defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." And further, "in every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." Inasmuch as the court itself handled the problem decisively, it may well be concluded that the majority considered the problem to be one of defining the scope of defendant's duty and that such duty did not comprehend a risk of the sort involved, even though the duty was a high one.

The following sentences from the opinion give further

support to this conclusion: "The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would result. *These from the point of view of the law were the bounds of her immunity.* * * *"

From a reading of the entire opinion, the conclusion that the majority were dealing with the problem as a duty problem seems to be a safe one. The only other theory which would have justified the court's handling the problem without the aid of a jury would be that the evidence did not raise an issue of negligence: that is, assuming a duty to the plaintiff against the risk involved, there was no evidence showing any conduct on the part of defendant as to its violation which would warrant two different reasonable inferences: hence, nothing for a jury to decide. This is such a well recognized function of the court that doubtless if the majority had turned their judgment on such a ground, it would have been stated with unmistakable definiteness. To the contrary, the majority assumes that defendant was negligent in the manner the passenger with the bundle was handled in getting him aboard the moving train: negligent both as to him and anyone standing near, against whom he might have come in contact either with his person or his luggage. But such conduct could not be negligent toward plaintiff, who was standing on the other side of the platform, *because no*

duty was owed her with reference to that conduct. In other words, the defendant owed a duty to the boarding passenger and to others who might have been prejudiced by such conduct as a result of the incidents against which such duty gives protection, but owed no duty to plaintiff against the hazard which transpired.

The minority of the Court of Appeals, speaking through Judge Andrews, assumed a duty and insisted that plaintiff was entitled to rely upon its violation, but further insisted that the question involved was one of proximate cause and that it was for the jury to determine that question. Incidentally, the minority readily disowned that such a question involved the mere tracing of causal relations. That factor was too clear to be questioned. On the other hand, the minority insisted that "what we do mean by the word 'proximate' is that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. * * * It is a question of expediency. There are no fixed rules to govern our judgment * * * it is all a question of fair judgment. * * *" (In passing, this is believed to be the high water mark of judicial expression explanatory of the proximate cause concept.) It being necessary to draw an uncertain and "wavering line," the minority thought the jury ought to perform that function, or at least, that the court could not say as a matter of law that it could not be so drawn as to allow recovery.

These several methods of attack upon the case indicate the elasticity of legal theories as well as their wealth.

There is no one way to state a case for decision.[2a] There is no certainty that a similar statement will demand the same judgment. In fact, the dissenting judges in both courts insisted that the question was one of proximate cause, but in the Appellate Division the dissenting judges would have concluded the case for the defendant on the question, while in the Court of Appeals the dissenting judges on the same theory would have affirmed the jury's determination in favor of plaintiff.

It is hardly to be imagined that the judges were disagreed as to the problem involved. Put as baldly as possible, the question was simply whether the railroad company should bear the risk or whether it should stay where it fell. Their differences are found in the formulation of the question on which judgment should be passed, and this in turn was probably controlled by the larger question as to whose function it should be to pass that judgment. The power of judgment lodged in the Court of Appeals concluded by a bare majority that the question was one of the scope of the railroad's duty, and thus that the court itself should exercise the power of passing judgment on that problem. But why so? Legal theories do not suffice as an answer either as to why the problem should be formulated or so answered. The majority say the hazard was not apparent to the eye of ordinary vigilance. The minority argue that since defendant was a law-breaker in

[2a] Cf. the statement of Crane J., in O'Neill v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694 (1930): "An idea may be expressed in many different ways and many of our differences arise out of a choice of expression."

one respect, practical fairness and justice would make the defendant bear this consequence of its wrongdoing. But these are lean reasons and but indicate the poverty of legal theories as means of furnishing a rational basis for the judgment they so decisively articulate. On either theory, judgment could be thrown either way just as decisively without disclosing the factors which control such judgment. One court under any of the theories involved could reserve the power of judgment to itself; another court could as easily pass that power over to a jury. Why should one process be adopted rather than the other?

In a recent article [3] Professor Arthur L. Goodhart, the able editor of the *Law Quarterly Review* and distinguished writer in the field of Torts, has developed a seeming conflict between the *Palsgraf* case and *Smith v. London & S. W. Ry.*[4] His suggestion is that in the *Palsgraf* case, since the consequences could not be "reasonably foreseen," there was no responsibility upon defendant, and that such a holding repudiates the doctrine originating in the dicta of the *Smith* case to the effect that "foreseeability of consequences" has no part to play except in the determination of the issue of negligence.

The *Smith* case involved the setting of fire by the operation of defendant's engine to dried cuttings left on the railway right of way during a drouth. The fire spread from the right of way through an adjoining hedge, passed over a stubble field and burned plaintiff's cottage some 200

[3] The Unforeseeable Consequences of a Negligent Act (1930) 39 Yale L. J. 449.

[4] L. R. 6 C. P. 14 (1870).

yards away. In the Court of Common Pleas,[5] defendant's duty to plaintiff was assumed by all the judges except Brett. The only question that was considered in the Exchequer Chamber was whether *there was any evidence of defendant's negligence* (violation of its duty) to raise an issue for the jury. The judges were unanimous that there was such evidence. It was the point stressed in all the opinions in both courts. In passing on that question several of the judges employed broad language. Blackburn's frequently quoted sentence is representative: "I also agree that what the defendants might reasonably anticipate is * * * only material with reference to the question whether the defendants were negligent." This statement, while doubtless a reply to Brett's dissent on the point of responsibility (duty), was made with reference to the sufficiency of the evidence to raise an issue of negligence, *i. e.*, the violation of defendant's duty. The term "negligence" is but a short way of saying that defendant failed to exercise the care of an ordinarily prudent person under the circumstances, *viz.*, that he should have foreseen harm to plaintiff's interests as a result of his conduct.[5a] The *issue* of "negligence" is always a jury ques-

[5] L. R. 5 C. P. 98 (1870).

[5a] Dean Young B. Smith was kind enough to look over this article while in proof and to make certain very pertinent criticisms. In order to raise his points clearly, I am quoting in part what he says: "(1) Throughout your discussion of the Smith case you are assuming 'probability of harm to Smith's interest' * * * (2) As I read the Smith case, L. R. 6 C. P. 14 (1870), the majority of the judges assumed that there was no reasonable probability of harm to Smith's interest, but that since there was a rea-

tion.[5b] Thus, the judges were correct in saying that if the jury found that defendant was negligent, that terminated the function of the "foreseeability" formula.

sonable probability of harm to someone the defendant was negligent. Certainly this was the view of Kelly, C. B., Channel, B., and Blackburn, J., and there is nothing to indicate a contrary opinion on the parts of Martin, B., Bramwell, B., and Lush, J.

"Having once decided that the jury was justified in finding that the defendant was negligent in the sense that it created an unjustifiable risk of injury to someone, it was immaterial that the injury which actually resulted to the plaintiff was improbable. Judging by the pleadings which are reported in L. R. 5 C. P. 98 (1870) and the statement of facts contained in the various opinions, I think it is reasonably clear that Smith was not the owner of the stubble field which caught fire as a result of the defendant's conduct. The plaintiff's premises and house were located on the other side of a road some distance away. Had the owner of the stubble field brought an action to recover for the burning of his field, obviously the jury would have been justified in finding that the defendant's conduct created an unjustifiable risk of injury to him. It was probable that the field would be burned; therefore it was probable that his interests would be affected. Suppose, however, the railroad had owned the stubble field as well as the dry grass and hedge; if, as Kelly, C. B. said, there was in fact no probability that a fire started on the right of way would spread to the premises of the plaintiff, would the court have been

[5b] Dean Smith also called my attention to the fact that this sentence may not be understood. I give the term "issue" its orthodox meaning, i. e., a question raised by the evidence. I recognize, of course, that courts frequently direct verdicts both for and against defendants when under the evidence there is no room for reasonable minds to disagree or, as otherwise stated, when only one reasonable inference can be drawn. But in such cases no issue is reached, and in absence of an issue it is for the judge to rule. In the Smith case an issue of negligence was reached, according to the judges, and hence it was for the jury.

But the judges did not say, nor did they imply, in determining the problem of duty and its scope, which is the judges' function, that the normal experience of human be-

justified in upholding a verdict of a jury to the effect that the defendant was negligent? In other words, if the fire created no risk of injury to anyone other than the defendant, how could the defendant be said to have been negligent?"

As to the first sentence, I think he has misunderstood what I have tried to say. I do not intend to assume the probability of harm to Smith's interest any more than the judges did. I merely intend to say, with the judges, that there was enough of a question raised as to defendant's negligence to go to a jury. This was all that was decided by either the judges of the Court of Common Pleas or in the Exchequer Chamber. Brett thought the evidence not sufficient to raise an issue. On this issue the jury was free to find either way. In fact, however, the jury was precluded from finding on the issue by defendant's consenting to a verdict for plaintiff if there was any evidence raising the issue.

As to the second point, I do not think Dean Smith's conclusion sustainable. The judges were not passing on the question he raises. Any discussion relevant to such a point was only incidental to the main question before them. Some of them did advert to the point expressly, however, and wherever they did so, their statements support a contrary conclusion. For example, in the Court of Common Pleas, Bovill, C. J. says: "Under ordinary circumstances it may be that hedges are not expected to ignite; but, if there be collections of grass and hedge trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger: and who is to say where the danger will stop? • • • I think it is impossible to say that it was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff." Pigott, B.: "It comes to this, that in a dry summer, with a knowledge of the risk of fire which must be caused, the defendant left heaps of combustible matter along the side of their line; then whether the fire did arise from those

ings, which is the basis of foreseeability or probability, is not to be considered by the judge in his exercise of that function. That the factor of experience is one of the

heaps was a question for the jury, and it seems clear that it either came from, or at any rate increased by, the heaps and so got through the fence into the field, and when once in the field there was no way to stop it until it burned the plaintiff's cottage, and this, as it seems to me, was nothing but what a reasonable man might have anticipated."

The only doubt thrown on the proposition that the negligence formula requires the foreseeability of harm to plaintiff's interest is found in the reply by way of dictum made by Kelly, C. B., to Brett's argument in opposition. Kelly, C. B., says: "It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. (This is a fire case.) It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed."

It must be remembered at this point that both Brett and Kelly were talking about the extent of liability in a fire case (a duty problem) and not about a jury issue. Brett's contention was

weighty considerations in a judge's determination of duties is readily conceded by everyone. That it is not the only factor, however, ought also to be readily conceded. There are numerous factors which influence the judge in his judgment.[6] The judge may, and frequently does, decide cases before they reach the stage of jury participation. His function of defining duty may take many forms: (1) He may simply say that there was no duty,[7] (2) that if

that there was no evidence to go to the jury because he thought responsibility should not extend so far. It is true that he based his conclusion on the lack of reasonable anticipation of harm to the plaintiff's cottage. In doing so, it is believed he obscured his point by confusing the judges' function with that of the jury. At any rate, Kelly, C. B., and some of the other judges effectually answered him by saying that the question involved was not one of the extent of responsibility but rather whether there was any evidence of defendant's negligence for the jury to pass upon. Since it was Smith's interests which were involved, it does not seem justifiable to assume, in face of contrary expressions by other judges, that the issue of negligence for the jury was without reference to those interests. In absence of instructions themselves, no one can say with assurance what they would have been, except that there was an issue of negligence which was for the jury on the basis of "foreseeability."

It may be added that in 1870 the negligence formula had not been fully matured. Much of the language used by the courts then as now, is highly confusing unless the functions of judge and jury, respectively, are clearly kept in mind.

[6] I have attempted to develop these factors in my article, The Duty Problem in Negligence Cases (1928) 28 Col. L. Rev. 1014.

[7] Robert Addie & Sons v. Dumbreck, 45 T. L. R. 267 (H. of L., 1929); Buch v. Amory Mfg. Co., 69 N. H. 257, 44 A. 809, 76 Am. St. Rep. 163 (1898); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921).

there was a duty it was not owed to plaintiff;[8] (3) that if owed to plaintiff it was not designed to protect the interest of plaintiff which was injured;[9] (4) that if owed to plaintiff and designed to protect the interest which was injured, it was not designed to give protection against the hazard which was involved;[10] (this is doubtless the point at which the majority turned the *Palsgraf* case); and he might further say (5) that plaintiff was himself at fault, that is, assumed the risk or was contributorily negligent, etc.;[11]

[8] Garland v. Boston & Maine R. R., 76 N. H. 556, 86 A. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924 (1913); Borankay v. Robinson & Carpenter, 247 N. Y. 365, 160 N. E. 400 (1928).

[9] Phillips v. Britannia Hygienic Laundry Co. [1923] 2 K. B. 832 (Ct. of App.) (Banks, L. J. said: "We have not to consider the case of a person injured on the highway. This injury here was done to the appellant's van."); DiCaprio v. New York Cent. R. Co., 231 N. Y. 94, 131 N. E. 746, 16 A. L. R. 940 (1921); Texas & P. Ry. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162 (1896).

[10] Gorris v. Scott, L. R. 9 Exch. 125 (1874); Shelden v. Wichita R. & Light Co., 125 Kan. 476, 264 P. 732 (1928); Gaupin v. Murphy, 295 Pa. 214, 145 A. 123 (1928); Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249, 26 L. Ed. 1070 (1881).

[11] B. & O. R. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24 (1927); Butterfield v. Forrester, 11 East, 60 (1809); Chesley v. Waterloo, C. F. & N. R. Co., 188 Iowa, 1004, 176 N. W. 961, 12 A. L. R. 1366 (1920); Garrow v. Seattle Taxicab Co., 135 Wash. 630, 238 P. 623, 45 A. L. R. 293 (1925). The complex of doctrines at this point is intricate. They are most important limitations upon duties. The terms are so elastic and used in so many ways that any skillful judge need not fear doctrinal restrictions. See McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928). (This is a marked instance of the skillful use of doctrines. Faced by a case based

and he might still further say (6) that even though a judgment is warranted in favor of plaintiff at all of these points, yet there is no evidence that defendant violated his duty to plaintiff,[12] (this is the turning point of the *Smith* case, but the court turned the point in plaintiff's favor) and thus no issue for the jury; or (7) that there is no evidence of causal relation between such violation and the damages;[13] or (8) that there is no evidence that plaintiff suffered any damage. Moreover, he can articulate each one of these points in a great variety of equivalent language.

Professor Goodhart, after taking to task many of the able writers in the field of Torts for their seeming inconsistency in approving the dicta of the judges in the *Smith* case, desires to know how the present writer would reconcile his approval of both the *Palsgraf* and *Smith* cases.[14]

upon nuisance, but clearly one which might have been based upon the negligence theory against which the defense of contributory negligence would have been available, the court obviated the difficulty by recognizing a "negligent nuisance." That having been done, the doctrine of contributory negligence was available. Would it have been possible to have left the nuisance theory intact and have urged against the plaintiff the doctrine of assumed risk?) See also Yaconi v. Brady & Gioe, 246 N. Y. 300, 158 N. E. 876 (1927); (1928) 37 Yale L. J. 831.

[12] O'Connor v. Omaha & C. B. St. R. R. Co., 104 Neb. 534, 177 N. W. 838 (1920); Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193 (H. of L. 1877).

[13] Benedick v. Potts, 88 Md. 52, 40 A. 1067, 41 L. R. A. 478 (1898); McCrosson v. Philadelphia Rapid Transit Co., 283 Pa. 492, 129 A. 568 (1925); Gerber v. Wloszczynski, 188 Wis. 344, 206 N. W. 206 (1925).

[14] "Professor Green in his book on Rationale of Proximate

It is clear from what has already been said that I do not think there is anything inconsistent in the holdings of the two cases which demands reconciliation, or that the dicta in the *Smith* case are in any way out of line with the holding of the *Palsgraf* case. The cases are not only different in type but are dealt with differently. The only way a conflict can be developed between the two cases is to say that one case supports a certain fantastic generalization, the dicta in the other a different and equally fantastic generalization, and then that such generalizations clash. But by this time the cases have been lost sight of and only the generalizations remain. The fight is then on in an atmosphere wholly removed from the cases, and in phrases which have no integrity of their own; nothing but the meaning one may wish them to contain. The way to obviate a conflict is to stick by the cases. Incidentally, another way is to challenge the validity of the generalizations themselves. Either method is equally fatal to the supposed conflict in question.

The difficulties evinced by the distinguished English writer are quite general. They grow out of the failure to consider: (1) The functions of legal theories and formulas; (2) the differences in the types of cases. He, with others, seemingly assumes that legal theories are employed as means to point unerringly to acceptable results.

Cause cites the Smith case with marked approval. • • • But in a recent article he also approves the result reached in the Palsgraf case. It would be interesting to see how he reconciles these cases." Op. cit. supra note 3.

This is believed to be an insupportable assumption. Legal theories and formulas are employed: (1) to reduce the cases to terms which are convenient to work with and delicate enough in their delineation of the difficulties, to allow someone (either judge or jury) to pass judgment upon the case; (2) after such judgment is passed, to articulate what judgment has been passed. In performing the first function, legal theories and the formulas based upon them merely launch the inquiries to be made. They are hypotheses. They translate the matters involved so that the problem or problems can be seen the more clearly. For example, when the judge makes the inquiry, "Did the defendant owe any duty to the plaintiff?" he is focusing the problem so that he can exercise his judgment intelligently. After such an inquiry has performed its function and a workable theory has been hit upon as laying out the problem in a clear way, the same theory is then used to indicate the solution to others. But legal theories have no vitality of their own, nor have they much integrity. Different judges may use them for different purposes. After all is said that can be said, they are the merest intellectual machinery. Professor Goodhart and others have hit upon the "foreseeability" formula, which has been widely employed as the means for translating a negligence case to a jury, as a means of determining the *whole* problem of *responsibility* on the part of the defendant, whether by the judge or the jury. He would employ it at every stage in a negligence case and as a universal test of responsibility. He therefore concludes that the refusal to find respon-

sibility in the *Palsgraf* case, where the majority was exercising the function of the court in the determination of duty, is a repudiation of the dicta in the *Smith* case by which the judges confined the use of "foreseeability" to the jury's function in passing upon defendant's violation of duty. It is true that in the latter case Brett thought there was a question as to the duty owed to plaintiff. He did not make his point very clear, and probably obscured it because he identified it with the stage of jury participation.[15] His contention was that Smith's premises were situated too far away to be within the scope of defendant's duty with reference to setting out fire. Had the battle been pitched at that point, rather than at the point of the sufficiency of the evidence to go to the jury, the English judges would have had the same problem as Judge Cardozo developed in the *Palsgraf* case. But if so, the court would not have had to consider the question of the sufficiency of the evidence as a basis for the employment of the "foreseeability" formula in a determination of the negligence issue until the court found a duty owed to Smith which comprehended the risk of burning his house. The court having assumed

[15] "But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situated that the defendants ought to have known that by permitting the rummage and hedge-trimmings to remain on the banks of the railway they placed it in undue peril." Supra note 5, at 103.

there was a duty, Smith was entitled to recover if the jury found that the defendant was negligent, that is, should have reasonably foreseen probable harm to Smith's interests.[15a] The trouble arises in attempting to use the formula of "foreseeability" as a *sole* determinant of duty. It is not significant enough for the refined judgment of the judge. He can reduce the factors to less comprehensive terms. Foreseeability is based upon experience; experience is, of course, a factor in determining the scope of duty, but by no means the sole factor. It frequently happens that duty coincides with experience, but not always so, and it is a mistake to think that judges are so narrowly bound, or that they need a formula for their purposes.

This further ought to be said. The term "duty" in a legal formula supplies a function similar to the term "X" in an algebraic formula—What does "X" equal? The term "negligence" or "violation of duty" performs the same function as "Y"—What does "Y" equal? One is for the judge, the other for the jury. Both are unknown quantities. The court's function indicated by its inquiry as to "duty" is in final analysis the question whether the case demands the concurring judgment of a jury in its determination. If it does not, then the court simply says there is no duty, as the majority said in the *Palsgraf* case. But if the court is not so satisfied with its own conclusion, then the court submits the case to the jury, as in the *Smith* case, if the evidential data warrant so doing. After all is said, this marks the line of difference between the majority

[15a] See supra note 5a.

and the minority of the New York Court of Appeals. The majority thought the question one for their determination; the minority thought the question should not be so determined, and that the jury's verdict should stand. Singularly enough, nearly all legal theory in negligence cases is designed to serve the ends of allocating the power of judgment respectively to judge and jury. But the court may readily agree in a particular case that there is a duty, yet may also feel that evidential data are so weak as not to justify the submission to jury. In such event, the court indicates its assumption that there is a duty and thereby leaves the door open for other such cases, but decides the particular case on the basis that there is no evidence that the duty has been violated. The two functions (one, defining duty; two, determining whether the evidence raises the issue of negligence—violation of duty) require sharp discrimination in many cases. It is not infrequent that the decision on a close case may be articulated through either function with equally good results so far as the case is concerned, for a negative decision will be for defendant in either event. When such is done, the integrity of legal theory suffers from the judge's poor technique, but that is the only harmful result, even if that can be considered harmful.

But whatever formulas or theories may be employed in a case, they tell little as to why they are used; that is, as to why a court decides as it does. Probably Professor Goodhart and others would question this statement. They would also insist that the same formula should get the same result in all cases; lack of foreseeabil-

ity in the *Palsgraf* case means no responsibility; the same lack of foreseeability in the *Polemis* case [16] or the *Smith* case should likewise mean no responsibility. But the fact is that while the foreseeability formula for translating a case to a jury may be standardized for purposes of translation, it does not mean that such formula controls the jury's judgment. It only assures a standardized method of translation. If so, how can it be expected that such a formula, even if sufficient in its comprehensiveness, could control the judgment of different judges? Even if the formula should be employed as the determinant of duty, could it be expected to be anything more than a formula? What one would "foresee," another would not; the eye of "foreseeability" varies in range and precision as does the eye of present observation. Would not the judgment of judges differ just as widely as they do without such formula? Are there not too many devices found in legal theory to assume that men's judgments can be effectively controlled by formulated statements?

But there are factors which do operate to control judgment. They may lie deep or near the surface. More frequently they are not hard to discover. They are found aligned differently in different types of cases. In the *Smith* case, for example, the railway company was handling the substance of fire. Fire set out by engines causes great economic loss to property interests located near railway tracks. Good economics require the severest restriction upon the employment of fire in order to prevent such

[16] Polemis v. Furness, Withy & Co., [1921] 3 K. B. 560.

losses. The railway can more easily prevent the hazard than the adjacent landowner; as between him and the railroad it can also more easily absorb the loss, either out of profits or by distribution. In such cases the theories, formulas and rules employed under the label of "negligence" are for all practical purposes as exacting as the theories, formulas and rules which we know as insurance law.[17] It is no wonder, therefore, that the court had so little trouble in disposing of the *Smith* case. The judges were willing to impose liability if the jury were.

In the *Palsgraf* case, the situation was more difficult. Plaintiff was a passenger. There is no group of cases where the theories, rules and formulas are more exacting than in railway passenger cases. But they are based on good grounds. Railways are in charge of the operation of complex and dangerous machinery. If it is not handled with care, it is most destructive of human life. Therefore the preventive or prophylactic factor operates most heavily against the carrier of passengers. Railways can also absorb or spread the loss more easily than can the hurt passenger. Imposition of liability upon them is therefore a mild form of insurance. This argues for recovery for Mrs. Palsgraf. How can the denial of recovery be war-

[17] Vaughn v. Menlove, 3 Bing. N. C. 468 (1837); Musgrove v. Pandelis, [1919] 2 K. B. 43; Burlington & M. R. R. Co. v. Westover, 4 Neb. 268 (1876); Lawrence v. Yadkin River Power Co., 190 N. C. 664, 130 S. E. 735 (1925); Anderson v. Minneapolis, St. P. & S. S. M. R. Co., 146 Minn. 430, 179 N. W. 45 (1920); Dickelman Mfg. Co. v. Pennsylvania R. Co., 34 F.(2d) 70 (N. D. Ohio 1929). (Good opinion by Hahn, J.)

ranted? Probably the preventive factor does not operate so heavily in such a case. After all, the taking on of a passenger while the train is moving slowly is not such a heinous offense. It is common practice. The railway takes what risks there are in the great bulk of such cases, but should they take them in all cases? What steps could the railway take to prevent passengers getting on with bundles of fireworks, or how could it develop a way to prevent bundles dropping? Would not this be pushing prevention to the very point of what we term insurance? As rich as railways may be, as easy as it is for them to spread the loss, as necessary as it is to subject them to the strictest precautions, government does not yet impose all risks upon them. Probably the majority of the New York Court of Appeals thought that if there is any place to stop, it was at this case. Thus the question after all was far deeper than any matter of foreseeability or experience. It was a matter of adjustment by government of risks which, while normal in that they occur in constant variety, can not be eliminated from the hurly-burly of modern traffic and transportation. This case marks the frontier of the railways' responsibility by as clear a line as our governmental machinery permits to be drawn—the difference between the judgment of four men as opposed to three. In some other court the judgment might be turned against defendant by equally as slender a margin. If so, that would be acceptable too. Legal theory is not designed to take the place of judgment in such cases; the formula can not be invented which relieves the judges and juries from the painful necessity of using their good sense in deciding cases.

The attempt to sustain the foreseeability of harm or the probable consequence formula as adequate for the determination of negligence cases, is futile. Howsoever far these elastic terms may be stretched, there are too many cases which go beyond their bounds. It would be equally futile to sustain a contrary formula if one could be phrased. The fact is that all such talk about foreseeable and unforeseeable consequences, probable, natural and proximate consequences, and other such terms, is just so much "talk in the air." These terms are useful only when employed with respect to the functions which they serve. The foreseeability of harm or probable consequence formula has a legitimate place in translating a negligence case to a jury. It has become crystallized and probably serves as well as any other ritual that could be devised.[17a] "Proximate"

[17a] In a recent case before the New York Court of Appeals it appeared that defendant city had permitted the owner to block off the sidewalk adjacent to construction work, thereby forcing the pedestrian traffic into the street. A child, for whose death suit was brought, while walking in the street at this point, was run over by an automobile. The court, in holding that the question of the city's and property owner's negligence was for the jury, said through Crane, J.: "We are, therefore, of the opinion that in this case the jury must determine whether the risk of being hurt in passing traffic was reasonably to be anticipated by those who shut off the sidewalk, and turned passersby into the street. Would the danger of such an act be apparent to the ordinarily prudent man? If so, there would be negligence. This is the measure by which we seek to determine the question of liability in tort cases through the means of a judge or jury. To attempt to phrase a different rule for liability for negligence, one which will be more inclusive or exclusive, fitting exactly every circumstance

served the same purpose for the judge in many early cases as a way of stating his problem involving the bounding of rights and duties, but its usefulness as an analytical term has been destroyed by resolving it into a universal formula for every phase of responsibility, whether to be determined by judge or jury. The English judges have transferred their affections for this term to the term "direct," [18] which

which may arise, has proved an impossible task to those who have given intensive study and application to the subject of torts." O'Neill v. City of Port Jervis, supra note 2a.

[18] Polemis v. Furness, Withy & Co., supra note 16; Weld-Blundell v. Stephens, [1920] A. C. 956 (Lord Summer in this case, at 983, said: "What are 'natural, probable and necessary' consequences. Everything that happens, happens in the order of nature and is therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary,' except in the sense of predestination. To speak of 'probable' consequences is to throw everything upon the jury. It is tautologous to speak of 'effective' cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result." It will be noted that the English judges make it very clear that at least one consideration which controls their use of formulas is the allocation of the power of judgment to judge or jury. English judges are inclined to withhold more power to themselves than are American judges, and they are more candid about the fact. See Robert Addie & Sons v. Dumbreck, supra note 7.

is no more accurate, but which will doubtless serve their purpose until they discover something better. If it could once be understood that there is little value derived from attempting to put the weight of judgment on these terms, a long step ahead should have been taken in legal science. They quickly transport any inquiry from the realm of simple data and considerations of everyday life into the realm of metaphysics, where the vain and painful search for "ratio decidendi" and like phantoms is begun, merely to be lost in a flood of words. Legal science ought to be able to devise neater terms for phrasing its problems and articulating its processes. It will do so when it gives over the hope that it can subject the world of life to control by a few "pat" phrases and formulas. The science of law deserves a dignity that comes from a more rational technique.

CHAPTER 9

LAW AND FACT

The power of control which we call "law," to which, through governmental agencies, men subject themselves or are subjected, is not a simple concept. It serves a complex and constantly changing world of men and their interests. It must be and is as universal as there are agencies for making use of it. So far as is apparent its sources are found in these agencies, who, first of all, are men with all the weaknesses, stupidities, notions and flashes that men have. Ultimately, of course, its source is found in the desires of citizens. The detailed uses to which this power is put are without number, and they seldom remain constant for any long period. The "law" of to-day is not the same as it was yesterday nor what it will be to-morrow. A little while ago the courts were dealing largely with the personal injury suits of railway and street railway passengers, suits by employees against employers for personal injury, suits involving stock laws, land boundaries, labor riots, telegraph messages, rebates, trust busting, oil and gas leases, and the like. To-day the courts have the varied sorts of automobile cases and problems of urban development, taxation, liabilities of manufacturers, sellers, and those who carry on the vast construction projects of industry, the devices of far-flung commercial enterprises and systems, rum runners, racketeers, liability insurance, corporate reorganization and combination, and others. In the offing we see the problems of air space and air chan-

nels, with the numerous modifications of existing rules in all phases of property, contract, tort, criminal law, constitutional law and elsewhere. The re-ordering of legal machinery on a large scale, and the re-articulation of legal rules in terms of a more comprehensive science of governmental control, seem easy guesses.

To think of "law" as a subject-matter with a fixed content is to mistake the accumulated results of legal processes for "law" itself, or else to reflect these processes at but a single moment of time. But even at a single instant, there will be found in the same jurisdiction all stages of legal development, "primitive law," "strict law," "the stage of equity," and "a maturity of law." [1] To talk about the totality of clashing and contradictory doctrines, theories, principles, formulas, rules, statutes and constitutions which are employed in government as "the law of the land" is to reduce the utmost chaos to a quiet figure of speech. To define "law" as an "aggregate of rules" is to assume that rules are the important phases of a legal science. These paraphernalia of government vary from the merest ill-defined concept to a full-blown imperative, and to the other extreme of a pious phrase which has lost its life. Likewise, the human agencies through which "law" is made available run the whole distance from the village constable to the House of Lords, and the plumbing inspector to the Federal Reserve Board or League of Nations. The machinery of "law" is no less than the sum of all the myriad agencies and processes of current government. A

[1] See Pound, Theories of Law, 22 Yale L. J. 114, 117 (1912).

science of "law" involves the knowledge of how and why that machinery has been set up, its operations, and how to improve upon its structure and operations to the end that the power of human judgment may the more acceptably control human conduct and adjust its conflicts.

To serve the variable needs of a science of "law" through its multiple and changing instrumentalities there is need for a large vocabulary of tough, elastic, indestructible words. Such among others are those equally expansible and collapsible terms "law" and "fact." It is readily acknowledged that the term "law" is indefinable. No less difficult to bound is the orbit of that companionate phantom "fact." What is a "fact"? As simple as this concept may seem, it has never submitted to definition. A truly great legal scholar launches his discussion of "facts" with this sentence: "An actual fact is one that really exists." [2] No two terms of legal science have rendered better service than "law" and "fact." They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. In them and their kind a science of law finds its strength and durability. They are the creations of centuries. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy. They may torture the souls of language mechanicians who insist that all words and phrases must have a fixed content, but they and their flexibility are essential to the science

[2] Terry, The Common Law, p. 135 (5th Ed. 1917).

which has to do with the control of men through the power to pass judgment on their conduct.[2a]

IN PLEADING

The terms "law" and "fact" in pleading have been recently developed by several writers.[3] The distinctions between an evidentiary fact, ultimate fact, material fact, conclusion of fact, and conclusion of law, are utterly incomprehensible unless the purposes which the courts are making them serve are first understood. If these distinctions have brought confusion it has been because of our notions as to the function of pleading rather than the fault of the words. It may well be that a legal science no longer needs the nice usages which have been developed at this point. They have probably served their purpose in getting rid of the most hurtful of the evils which arose from the nice refinements developed in the use of forms of actions, and now the purposes of pleading might be better served by a return to terms as comprehensive as those employed in the early actions, except, of course, where fair notice requires the defendant to be given a more detailed statement. Conclusions, whether of fact or of law, are in most cases sufficiently informative and much easier of statement. Even so, rulings for and against the pleader would doubtless

[2a] See discussion by Edwin W. Patterson, Can Law Be Scientific, 25 Illinois Law Rev. 121, 131 (June 1930).

[3] See Clark, Code Pleading, p. 150 et seq. (1928); Cook, Statements of Fact in Pleading under the Codes, 21 Col. L. Rev. 416 (1921).

continue to be made, and their articulation would probably find no terms which would leave future rulings so unhampered as would these. Their elasticity commends them for usage at a point where there is the utmost variability from case to case and at a time when we no longer desire to settle disputes on the paper statements of the parties' claims. The reversal of the form of this rule of pleading would make easier administration, inasmuch as the rule could and would be the more readily complied with, and also its violation would be of less serious consequences. When the court desired to condemn a pleader for pleading too minutely, it could do so by admonishing him that the rule required "conclusions" and not "facts." The reduction in the instances when such distinction would be employed would not undermine its validity except that it would tend to fall out altogether as the futility of the distinction became apparent.

IN EVIDENCE

A similar usage of these terms is encountered in producing the data on which a litigant rests his case. A witness is supposed to state "facts" and not his "conclusions" or "opinions." The witness' judgment that a party acted maliciously or negligently, or fraudulently, or otherwise, stated in terms of legal color, is not wanted. He must relate his observations in terms of the lowest denomination. The fact that all observations must go through the strainer of the observer's intelligence before they can be articulated and however stated are judgments which he has passed,

is consistently ignored. Whether such judgments are given in detail or lump sum, they are given the color of the witness' values; they are his "conclusions"; they are his "opinions"; they are also his "facts." The desire on the part of the court that a witness give his observations in detail rather than in bulk is poorly expressed by the terms "fact," "opinion," or "conclusion"; nevertheless they are used, and it is only by an understanding of the purposes behind such usage that the terms are at all intelligible. But with an understanding of such purposes the courts are enabled to employ them as means of obtaining the data desired as a basis of their decisions. The wonder is that such divergent purposes can be achieved through the same words.[4]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The usages of the terms under discussion in the "findings of fact" and "conclusions of law" involved in trials by judges without juries, are also well established. Here they serve the purposes of the appellate courts. A trial judge whose judgment is questioned by a losing party may probably disclose to the appellate court the weakness of his judgment in his findings of fact and conclusions of law; he likewise may disclose its strength. His findings of fact must be supported by the evidence in order to be sustainable. His conclusions of law based upon those facts must be sustainable in point of legal theory. In such manner

[4] For a most complete and interesting exposition of the "opinion" rule, its purposes and absurdities, see Wigmore on Evidence (2d Ed. 1923), § 1917 et seq.

the judgment of the trial court is laid open so that his processes can be traced and checked by the appellate courts. Many difficulties arise in distinguishing findings of fact from conclusions of law.[5] But these in no wise detract from the device, for upon analysis it will usually be found that such difficulties are those of judgment itself rather than the power to discriminate between "law" and "fact." Inasmuch as the difference in judgment is the very point that is sought to be developed by this device, even though sometimes furtively, these terms are of the highest value in lending themselves to the convenience of appellate courts. Their capacity for allowing the widest latitude for disagreement as well as expression, without in the least impairing their integrity as words, is apparent.

FACTS AS BASIS OF PRECEDENTS

The framework of *stare decisis* rests upon the ability of legal science to find a foundation upon the "facts" of a case. A principle must rest upon the facts from which it was deduced; principles unattached are dicta, however acceptable they may be.[6] The "facts" which give a deci-

[5] City of Buffalo v. Delaware, L. & W. R. Co., 190 N. Y. 84, 82 N. E. 513, 16 L. R. A. (N. S.) 506 (1907).

[6] Cohens v. Virginia, 19 U. S. (6 Wheat.) 375, 399, 5 L. Ed. 257 (1821); Quinn v. Leathem (1901) A. C. 495, at p. 506. In the latter case the Earl of Halsbury said:

"Now, before discussing the case of Allen v. Flood and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the

sion its "principle," or "ratio decidendi," or "law," have been the subject of prolonged speculation. In some cases the data are simple. These do not give much trouble, but as the affairs of men grow complex, and as government attempts to grade the protection it affords with nicer and nicer discrimination, agreement upon the relevant data to be taken into account becomes more and more difficult. It is thus that the principle or technique of "distinguishing" "fact situations" becomes of the highest importance as a modifying factor in the doctrine of *stare decisis*. The extent to which this counter principle may go is aptly expressed by a recent English writer: "The humblest judicial officer can disregard the most authoritative declaration of the House of Lords unless he considers that the precedent cited is 'on all fours.'" [7] When to this extreme power of "fact" discrimination on the part of the judge is added the equally extreme power of choosing between competing "principles" (theories, doctrines, formulas, rules), the integrity of a doctrine of *stare decisis* except as a convenient administrative device appears extremely doubtful. In fact, writers have at times insisted

generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

[7] Allen, Law in the Making, p. 164 (1927).

that there is nothing but quicksand at the base of the doctrine. But it is believed that they have merely failed to appreciate the object of the quest. Their difficulty in maintaining their sense of direction is not difficult to indicate. It is thus: The pertinent data involved in making difficult decisions are enormous; they are the subject of multiple statements; different lawyers and judges come to different conclusions as they develop the data they take into account and as they develop their evaluation of such data. Frequently even though they reach the same general conclusion, they vary in the details both as to the relevant data and their form of statement. They may also differ as widely as to appropriate principles. The confusion comes in thinking of these "facts" and "principles" as *constants* instead of *variables*. Decisions based upon variables are none the less precedents. The difficulty is in determining *for what* they are precedents. But there is every reason to rejoice over the difficulty instead of fretting about it. The situation is a beautiful one for legal science. The court or the judge who is bound by such a precedent has the privilege and power of saying both what the fact data are that make the decision a precedent, as well as what the principles are which control the case, and in this way he can literally build the precedent to support the ends his judgment dictates in the case before him. In this way the same case may be a precedent for as many holdings as there are judges who differ either as to the "facts" or the "principles" involved in its decision.[8] The flexibility of

[8] See Francis, Three Cases on Possession, 14 St. Louis Law Rev. 11 (1928).

the concepts both of "fact" and of "law" redounds to the creative ability of those who give direction to legal science. The fact that in many instances judges do not disagree as to the data and principles involved in a precedent, and as to both its persuasive and its binding effect, in no way impinges upon the suggestion that, if they should disagree, the vitality of their disagreements would rest upon the extreme adaptability of the terms "law" and "fact." Nor does this truth in any way detract from the doctrine of *stare decisis* as an administrative device of the highest importance.[9]

Incidentally, it may be added that when a "principle" has been extracted from a case and the attempt is to follow "principle" rather than precedent, the difficulty is in no wise either lessened or increased. The beginning of the process is merely reversed. The judge who follows "principle" must first assess the "facts" to which the "principle" he has chosen is applicable, and in doing so he is required to pursue the same processes as though he were seeking to follow precedent. The upshot of the whole doctrine of *stare decisis* is that both "law" and "fact" are variable factors which lend the greatest facility to the court's power of judgment in the case which must be decided. The doctrine is better than any magic, for its processes are rational. Under the hand of the skillful jurist it brings to his own judgment the support of men whose wisdom is no longer questioned. Whether it shall be employed as a restrictive doctrine for producing a sterility of

[9] See my discussion, The Duty Problem in Negligence Cases, 28 Col. L. Rev. 1014, at p. 1035 et seq. (1928).

decision, or as a constructive formula for administrative convenience in a developing legal science, depends upon the qualities of the judge—his learning, his psychology, creative capacity, facility for expression, and his alignment of the numerous factors which control his judgment.[10]

JUDGE AND JURY

The most important service which the terms "law" and "fact" render to legal science is found in the allocation of the functions of judge and jury in the trial of cases. Dean Thayer forty years ago sketched this usage in a most satisfactory manner.[11] Probably some of the suggestions he made then can be stated with greater assurance now. That the function of the early jury, corresponding somewhat to our witnesses, was to say what the "facts" were in any case they were called to try is very clear. That it was for the early judge to declare rules of law and advise as to the larger questions of policy is equally clear. "Fact" and "law" fitted these functions aptly. Certain it is that judges have utilized them with great effect for subjecting juries to control. That these terms expanded so as to greatly overlap as the respective func-

[10] For a full discussion of the doctrine of stare decisis, see the following: Allen, Law in the Making, chs. III and IV (1927); Gray, The Nature and Sources of the Law, chs. IX and X (2d Ed. 1921); Hardman, Stare Decisis and the Modern Trend, 32 W. Va. Law Quarterly, 163 (1926); Moschzisker, Stare Decisis, Res Judicata, and Other Selected Essays (1929); Oliphant, A Return to Stare Decisis, 14 American Bar Association Journal, 71, 159 (1927); Pound, Theory of Judicial Decision, 36 Harv. L. Rev. 641, 802, 940 (1923).

[11] Law and Fact, 4 Harv. L. Rev. 147 (1890).

tions of jury and judge expanded in the growth of the common law is a commonplace. This is so true that whatever sort of question the jury may pass upon is normally called a question of fact, and properly so. In so far as jury trial is concerned it ought to be equally acceptable to say that whatever sort of question the judge passes upon is a question of law. As a matter of practice, this is almost true, except that those who squirm at flexibility in words frequently insist that some of the jury's questions are mixed questions of law and fact, while some of the judge's questions are "preliminary questions of fact." But by and large the terms "law" and "fact" are merely short terms for the respective functions of judge and jury. And to discover these functions no *a priori* understanding of "law" and "fact" is sufficient. Nothing less than an historical survey of the numerous types of cases which come before juries can determine the respective functions of judge and jury with any precision. The confusion which has been caused here is due to the refusal to give to the terms involved their historical meanings, and an insistence upon giving them such meanings as will serve the ends of the court in the particular case. In order to understand the uses of these terms it is necessary to examine the types of cases in which they are used, and the formulas which have been developed with reference to the performance of their respective functions by judge and jury. The three chapters next to follow are attempts to translate the comprehensive formulas employed in cases classified as "deceit," "assault and battery," and "malicious prosecution," into the functions of judge and jury, "questions of law" and "questions of fact."

CHAPTER 10

DECEIT *

The hurts classified under the head of "deceit" usually involve property interests and particularly those interests as they are found in sales and credit transactions.[1] There is a constant tendency to broaden the classification,[2] but the protection given to other interests against the risk of deception must be looked for in all sorts of cases. The hurts to the *interest of personality* which are brought about through deception are classified as batteries,[3] false im-

*This chapter was first published in 16 Va. L. Rev. 749 (June, 1930).

[1] Professor Bohlen expresses somewhat the same idea in terms of "commercial, financial or economic advantage." See Bohlen, Misrepresentation as Deceit, Negligence, or Warranty (1929) 42 Harv. L. Rev. 733. See also Weisiger, Bases of Liability for Misrepresentation (1930) 24 Ill. L. Rev. 866. The latter article was read at the meeting of the Association of American Law Schools at New Orleans in December, 1929. It gives much support for some of the suggestions which the writer makes in this article.

[2] Jekshewitz v. Groswald, 265 Mass. 413, 164 N. E. 609, 62 A. L. R. 525 (Mass. 1929); Coakley v. Degner, 191 Wis. 170, 210 N. W. 359 (1926); Benoit v. Perkins, 79 N. H. 11, 104 A. 254 (1918); Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L. R. A. (N. S.) 581 (1913); Cunningham v. C. R. Pease House Furnishing Co., 74 N. H. 435, 69 A. 120, 20 L. R. A. (N. S.) 236, 124 Am. St. Rep. 979 (1908); Kuelling v. Roderick Lean Mfg. Co., 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124 (1905); Langridge v. Levy, 2 Mees. & W. 519, 150 Eng. Rep. 863 (Ex. 1837).

[3] Cadwell v. Farrell, 28 Ill. 438 (1862); Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920).

prisonments,[4] malpractice,[5] and as negligence.[6] Hurts to *interests in relations with others* as a result of deception are treated as slander, libel, interference with advantageous relations,[7] and also as negligence.[8] The *physical* hurts to *property interests* which result from deception are classed as trespass [9] or negligence.[10]

The formula for handling "deceit" cases as originally conceived required that the defendant (1) must have made a false representation, (2) knowing it to be false, (3) concerning a material fact, (4) for the purpose of inducing the plaintiff to act, and that (5) the plaintiff was induced

[4] Whittaker v. Sanford, 110 Me. 77, 85 A. 399, Ann. Cas. 1914B, 1202 (1912).

[5] Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. S. 139 (1926).

[6] Nickerson v. Hodges, 146 La. 735, 84 So. 37, 9 A. L. R. 361 (1920); Cunningham v. C. R. Pease House Furnishing Co., supra note 2; Wilkinson v. Downton, L. R. 2 Q. B. 57 (1897); Smith, Liability for Negligent Language (1900) 14 Harv. L. Rev. 184. Cf. Alpine v. Friend Bros., 244 Mass. 164, 138 N. E. 553 (1923).

[7] Hughes v. Samuels Bros., 179 Iowa, 1077, 159 N. W. 589, L. R. A. 1917F, 1088 (1916); Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111, 44 L. R. A. (N. S.) 228, Ann. Cas. 1914B, 824 (1913); Dudley v. Briggs, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494 (1886); Evans v. Walton, L. R. 2 C. P. 615 (1867); Allsop v. Allsop, 5 Hurl. & N. 534, 157 Eng. Rep. 1292 (Ex. 1860); Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. 244 (K. B. 1806); Davies v. Gardiner, 1 Pop. 36, 79 Eng. Rep. 1155 (K. B. 1593).

[8] International Products Co. v. Erie R. Co., 244 N. Y. 331, 155 N. E. 662, 56 A. L. R. 1377 (1927); (1927) 12 Corn. L. Q. 539.

[9] Townsend v. Wathen, 9 East, 277, 103 Eng. Rep. 579 (K. B. 1808).

[10] See Charlton v. Brunelle, 82 N. H. 100, 130 A. 216, 43 A. L. R. 1281 (1925).

thereby to act (6) to his damage. Around each element of this formula "areas of interpretation" have grown up which allow great latitude in passing judgment upon a particular case, and which in turn require the employment of numerous sub-formulas.

FALSITY

Any sort of misleading conduct ranging from express false statements, partial statements, concealment, to mere silence may constitute a false representation.[11] The instances are numerous. The limitations could scarcely be less restrictive.[12]

SCIENTER

In some cases the element of "scienter" in its strictest sense is a *sine qua non*. In other cases it has no place at all. The development of protection against the risk of appropriation by deception through separate actions on the warranty, assumpsit, and in deceit, has made possible many variations between these two extremes.[13] The doctrines of estoppel and rescission employed by courts of

[11] Fidelity-Philadelphia Trust Co. v. Simpson, 293 Pa. 577, 143 A. 202 (1928); Leonard v. Springer, 197 Ill. 532, 64 N. E. 299 (1902); Swift v. Rounds, 19 R. I. 527, 35 A. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791 (1896); Aaron's Reefs v. Twiss [1896] A. C. 273, 281, 283; Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421 (1882); Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5 (1877); Kidney v. Stoddard, 7 Mete. (Mass.) 252 (1843). Kerr, Fraud and Mistake (5th Ed. 1920) 68; 26 C. J. 1069 et seq.

[12] Stonemets v. Head, 248 Mo. 243, 154 S. W. 108 (1913).

[13] See Williston, Liability for Honest Misrepresentation (1911) 24 Harv. L. Rev. 415.

equity have permitted even more latitude. It was inevitable that confusion should follow this fragmentary development of legal protection, and especially so since the forms of actions at law declined in importance and the lines between law and equity became blurred. The fact that the development has differed from jurisdiction to jurisdiction makes any general statement of doubtful validity.

The easiest thing to say is that neither alternative, "actual fraud" on the one hand, nor "innocent misrepresentation" on the other, is sufficient as a doctrine for any jurisdiction. However vigorously either may be insisted upon, sooner or later it is modified so as to accommodate the opposite extreme. The factors behind some situations require a maximum of definiteness and certainty. Such, for example, are the more highly standardized contracts, sales, credit transactions as mortgages and negotiable instruments, and so-called trust relations. The harms which would come from allowing representations made and accepted in them to be seriously qualified at a later time would be too great. In such instances the courts have insisted that a defendant must be made to stand by his representations.[14] In other cases it would be equally unbear-

[14] Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N. Y. 1, 159 N. E. 700 (1928); Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425 (1922); Tischer v. Bardin, 155 Minn. 361, 194 N. W. 3 (1923); Joslyn v. Cadillac Automobile Co., 177 F. 863 (C. C. A. 6th, 1910); Holmes, J., dissenting in Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489 (1895); Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St.

able that a person should be held to the unqualified implications of his words or of his conduct. Many of the dealings between people are loose affairs, involving much talk and rambling negotiation. Such, for instance, were ordinary land deals, "horse" trades, the earlier corporate promotions. The insurance contract and the oil and gas lease are excellent examples of how even important contracts pass through many stages of development before they become well formulated. In the transactions of more or less undeveloped patterns the doctrines of "actual fraud" and sometimes of negligence are employed as means of permitting leeway in keeping with the demands of the interests and the habits of the people they serve.[15]

With the wealth of legal theory at the command of courts for handling cases involving misrepresentations, a case may ordinarily take any one of multiple directions. The taste and experience of both counsel and court have large parts to play here. Since there is no single way in which to classify cases as either contract, warranty, es-

Rep. 727 (1888); Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313 (1869); Polhill v. Walter, 3 Barn. & Ad. 114, 110 Eng. Rep. 43 (K. B. 1832).

[15] Sacramento Suburban Fruit Lands Co. v. Melin, 36 F.(2d) 907 (C. C. A. 9th, 1929); Dwyer v. Redmond, 103 Conn. 237, 130 A. 168 (1925); Sherwood v. Salmon, 2 Day (Conn.) 128 (1805); Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919); Mahardy v. McHugh, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487, 132 Am. St. Rep. 484, 16 Ann. Cas. 500 (1909); Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113 (1887); Derry v. Peek, 14 App. Cas. 337 (1889); Schwabacker v. Riddle, 99 Ill. 343 (1881); Sawyer v. Prickett, 86 U. S. 146, 22 L. Ed. 105 (1873).

toppel, rescission, or deceit,[16] the next best thing is to recognize a wide range of variation in "deceit" cases themselves. Hence, in "deceit" cases, as such, there are "scienter" formulas varying in their requirements from an insistence in the strictest sense upon "actual fraud" to formulas which do not require anything more than a false statement. Lord Herschell's "honest liar" formula developed in *Derry v. Peek* [17] is probably the best known of the first type and is followed closely in a number of important American jurisdictions.[18] It runs as follows:

"* * * First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always

[16] See Williston, loc. cit. supra note 13; Kerr, Fraud and Mistake (6th ed. 1929) 8; (1928) 37 Yale L. J. 1141.

[17] 14 App. Cas. 337, 374 (1889). See Smith, Liability for Negligent Language (1900) 14 Harv. L. Rev. 187, n. 4, indicating that the Directors' Liability Act, (1890) 53 & 54 Vict. c. 64, modified Derry v. Peek to the extent that in certain promotion cases it is required that belief be based on reasonable grounds. See also Kerr, op. cit. supra note 16, at 21, for amendments to this Act.

[18] Dwyer v. Redmond, supra note 15. Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919).

be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. * * *"

Probably the formula is less definite than it seems. Its limitations are perhaps largely a matter of language color. As do most English formulas, it allows the judge the maximum of power in passing judgment in the particular case. It restricts the jury as neatly as can be done to the function of evaluating the evidence. But judgment under this formula can be turned either way with equal facility on any close case. The ease with which the Lords in *Derry v. Peek* softened the misstatement there involved so that in the opinions of most of them it was not false at all, is the best example of what can be done with the formula.[19]

[19] Lord Bramwell said in Derry v. Peek, supra note 17, at 345:

"My Lords, I am of opinion that this judgment should be reversed. I am glad to come to this conclusion; for, as far as my judgment goes, it exonerates five men of good character and conduct from a charge of fraud, which, with all submission, I think wholly unfounded, a charge supported on such materials as to make all character precarious. * * *"

Lord Fitzgerald said:

"My Lords, I have, though with difficulty, arrived at the conclusion that the statement in the prospectus, that by the special Act the company had the right to use steam power, *was not untrue in a popular or business* sense."

"The conclusion I have arrived at, my Lords, is that this paragraph of the prospectus, though inaccurate in point of law in one particular, *seems on the whole to have been morally true*." (Italics ours.) Id. 355, 356.

Lord Herschell said:

"* * * I conclude by saying that on the whole I have come to the conclusion that the statement, 'though in some respects in-

A second type of formula permits the charge of "scienter" to be maintained by proof of false statement made as of the party's own knowledge, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge.[20] The Massachusetts court in *Chatham Furnace Co. v. Moffatt*,[21] which was decided just prior to *Derry v. Peek*, further says:

"* * * The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. * * *"

The formula looks formidable; and it is so if a court desires to use it strictly, but its variations are countless. In *Nash v. Minnesota Title Insurance & Trust Co.*,[22] decided a few years later by the same court, this formula was thought to be no stricter than that in *Derry v. Peek*,

accurate and not altogether free from imputations of carelessness, was a *fair, honest and bona fide statement on the part of the defendants,* * * *" (Italics ours.) Ibid. 380.

See discussion in Kerr, op. cit. supra note 16, chap. II, especially at 36–40.

[20] Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (1888); and see Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923 (1897).

[21] Supra note 20, at 169.

[22] 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489 (1895).

although the words employed by the defendant were obviously false. The Wisconsin court adheres rather closely to the second formula;[23] but in *Beckmann v. Salzer*,[24] the jury found that the defendant did not know at the time he made the statement which induced the plaintiff to invest in a certain stock that it was false. Still he was held liable. Yet the court treated the case as controlled by *Derry v. Peek*. In Minnesota an unqualified representation as of one's own knowledge when he does not know, although he may believe he knows, allows no escape.[25] In Washington "if a person states as true material facts susceptible of knowledge * * * he cannot defeat recovery by showing that he did not know his representations were false or that he believed them to be true."[26] In Illinois, as the rule is more recently formulated, "good faith is no defense where the fraud and deceit practiced consist of making false statements of fact as of the knowledge of the one speaking, for if one asserts a thing to be true of his own knowledge when it is not true, or when he does not in fact know whether it is true or not, his statement that he knows it to be true of his own knowledge is false whether the fact asserted is true or not. And if a person makes a positive statement that a thing that is sus-

[23] Palmer v. Goldberg, 128 Wis. 103, 107 N. W. 478 (1906).

[24] 168 Wis. 277, 169 N. W. 279 (1919).

[25] Tischer v. Bardin, 155 Minn. 361, 194 N. W. 3 (1923); Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am St. Rep. 485 (1889).

[26] Jacquot v. Farmers' Straw Gas Producer Co., 140 Wash. 182, 249 P. 984, 986 (1926); see also Jesse French Piano & Organ Co. v. Gibbon (Tex. Civ. App.) 180 S. W. 1185 (1915).

ceptible of knowledge is true, it is implied that he knows it to be true of his own knowledge, and, if he has no such knowledge, he is guilty of actual fraud. * * * Under such a state of facts, it is incompetent for one charged with fraud to prove what he believed, meant, intended or understood, in connection with the falsehood stated." [27]

In Nebraska, responsibility is imposed if the defendant knew his representation was false or else made it without knowledge as a positive statement of known fact.[28] There are many other similar variations not only as between jurisdictions but within the same jurisdiction. Just how must greater the elasticity of this formula is than that of *Derry v. Peek* is not ascertainable. It probably gives the court just as much power of decision on its own part, and unquestionably it allows a great compass for passing a case to the jury.

A third formula dispenses with the "scienter" element.[29] This formula is considered identical with the rule applied in warranty and rescission. It relieves the court from submitting any issue on this point to the jury. But in some jurisdictions its seeming severity is relieved by the qualification that if the defendant did not know his representation was false, and used reasonable care in determining its truth, he will not be held. The formula, as

[27] National Bank of Pawnee v. Hamilton, 202 Ill. App. 516, 521 (1916). Cf. Schwabacker v. Riddle, 99 Ill. 343 (1881).

[28] Peterson v. Schaberg, 116 Neb. 346, 217 N. W. 586 (1928).

[29] Jesse French Piano & Organ Co. v. Gibbon, supra note 26; Aldrich v. Scribner, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379 (1908); Miller, Innocent Misrepresentation as the Basis of an Action for Deceit (1928) 6 Tex. L. Rev. 151.

well as the qualification, takes a very broad range.[30] For instance, in a recent California case [31] in the Circuit Court of Appeals, the court said:

"Without further discussion, our conclusion is that, if defendant reasonably believed that the lands were as they represented them to be, and in good faith made representations consistent with such belief, it cannot be charged with actionable fraud. Of course, it cannot with impunity make reckless representations; considering the nature of the transactions and the serious consequences to purchasers if the lands are not suitable for fruit raising it was bound to take reasonable care to see that its belief was well founded. That much, good faith and due regard for the rights of those with whom it dealt required."

In Texas the rule is most frequently stated in its unqualified form. In *Seale v. Baker*,[32] a case involving representations made by a bank official to a depositor, the court said:

"* * * It is the duty of directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know, and which they have the means of knowing. * * * It is a familiar principle of law that an action for damages lies against a party for

[30] In some states the doctrine is embodied in statute form. See Cartwright v. Braly, 218 Ala. 49, 117 So. 477 (1928); Miller, loc. cit. supra note 29; (1928) 37 Yale L. J. 1141, 1149.

[31] Sacramento Suburban Fruit Lands Co. v. Melin, supra note 15, at 911.

[32] 70 Tex. 283, 7 S. W. 742, 744, 8 Am. St. Rep. 592 (1888).

making false and fraudulent representations whereby another is induced to do an act from which he sustains damage. If the representations are untrue, it is immaterial that they may have been made without fraudulent intent. * * *"

But in a later case involving the same transaction, the court by way of *dictum* said, with reference to the same officer:[33]

"* * * He was the principal officer and manager of the corporation. It was his duty to use reasonable diligence to acquaint himself with the affairs of the bank; but if, by the use of such diligence, he had been unable to do so, and he made a statement as to its condition which he believed to be true, but which was in fact false, he would not be personally liable for the consequences of that statement; but, on the other hand, if he could have ascertained the true condition of the bank by the use of due diligence, and failed to do so, then, in our opinion, he should be held liable for any false representation in regard to that condition, although made in good faith. * * *"

In Florida, the idea takes somewhat different form. In *Watson v. Jones*[34] the court said:

"* * * or, third, that the party's special situation or means of knowledge were such as to make it his *duty* to know as to the truth or falsity of the representation. * * * We are therefore of the opinion that proof of scienter in the third phase does not give another or differ-

[33] Giddings v. Baker, 80 Tex. 308, 16 S. W. 33, 35 (1891).
[34] 41 Fla. 241, 25 So. 678, 682 (1899).

ent right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, viz. knowledge, by a different class of evidence, and consequently that an allegation that defendant 'knew' his representation to be false is provable by evidence embraced in the third phase. * * *" (Italics ours.)

The foregoing instances are the merest samples of the numerous variations of the "scienter" formula which can be found in the reported cases. Just what differences in the administration of cases involving deception in sales and credit transactions result from the use of these several formulas with their variations, is not known, nor is it believed that such differences could be ascertained. Each formula is elastic enough to allow the broadest range, both in the exercise of the court's own judgment and in permitting the employment of a jury. *Can it be that the choice of formula is relatively immaterial?*

In dealing with cases of "honest misrepresentation," Professor Bohlen thinks that the courts which have eliminated the scienter element from the general formula have probably been misled by false analogies.[35] Possibly there is another alternative to be found in the fact that with the acceleration of business generally, as well as the standardization of the various types of of transactions, the factors which control judgment demand more and more certainty and precision in sales and credit transactions, and therefore that the risk of misrepresentation should be borne by those who misrepresent, whether purposely or innocently,

[35] Bohlen, loc. cit. supra, note 1.

rather than by the other parties to such transactions. Professor Williston insists that the issue is neither more nor less than "who should bear the loss" [36] and the courts seemingly are more and more inclined to deal with the cases on that basis.

Professor Bohlen's suggestion is that in the cases of "innocent misrepresentation" the risks which follow the misuse of words in business transactions would be determined as in other negligence cases, inasmuch as the conduct involved is in the field of negligent conduct. He says:[37]

"This article is written in the hope that it may cause courts to realize that in negligent misrepresentation the *important* thing is the *negligence* and *not* the fact that it is a *misrepresentation concerning a matter of business importance*. Accordingly, the liability should be determined by the general principles of the law of negligence; and merely because negligent misrepresentations are sometimes conceived of as extensions of the law of deceit and spoken of as a species of fraud, the rules developed in these actions should not be considered applicable to misinformation negligently though intentionally given." (Italics ours.)

The fact that the negligence network of legal theory was developed through cases involving hurts to the physical integrity of person and property is thought immaterial by Professor Bohlen. He says: "The speaking or writing of misrepresentations intended to induce another to act there-

[36] See Williston, op. cit. supra, note 13, at 434.
[37] Bohlen, op. cit. supra note 1, at 746.

on is in many respects similar to the turning over to another of land or chattels for the other's use with knowledge that the land or chattel is dangerous therefor. * * *" [38] He further says: "The differences between the two are either procedural or superficial. * * *" [39] It would seem that Professor Bohlen in urging this point fails to heed his own warning thrown out in the beginning of his very interesting article where he says: "* * * Further difficulties and anomalies are created by thinking in terms of *names* rather than *realities*. * * *" [40] (Italics ours.) Assuming that the negligence theories have worked with passing success in personal and property injury cases, it by no means follows that they would be adequate or adaptable for the cases involving unintentional misuse of words in business transactions. Even in the cases through which these theories were most largely developed—the master and servant cases, and traffic and transportation cases—it has been found desirable to subject them to frequent modification, and in many instances to depart from them entirely. The "deceit" cases are far removed from those cases, both in the interests and risks involved as well as in the type of transaction. Aside from other factors which are pertinent here but which have already been ably discussed elsewhere,[41] the fact that courts

[38] Id. 741.

[39] Id. 741, n. 9. The full text should be consulted in order to see how emphatically this point is made.

[40] Id. 733.

[41] See Williston, loc. cit. supra, note 13; Smith, loc. cit. supra, note 6.

have always used the deceit-warranty-rescission-estoppel network of theories in the types of transactions under discussion, with fair results, is a strong argument that they can probably better continue to use them rather than taking over the tangled network of negligence theories. Workability is of much importance and there is probably no group of cases more adequately supplied with intellectual machinery for getting acceptable results than the cases classified under "deceit" and "warranty."

Assuming that the negligence network of theories could be successfully adapted to the "deceit" cases, it is by no means certain that there would be any marked differences in the results obtained. The courts have many devices for bringing a negligence case under their own exclusive power without the participation of a jury. Where this is not done, they still have the power of weighting negligence cases so heavily against defendants with doctrines of presumption, *res ipsa loquitur*, high degree of care, and similar means, that a jury has little to do in determining them other than in passing on conflicting evidence. A recent illustration of the power of a court in this particular is found in *Glanzer v. Shepard*.[42] There is no court in the country more definitely committed to the formula in *Derry v. Peek* than the New York court.[43] Yet with a deftness nowhere surpassed, this court had no difficulty in obviating the requirements of Lord Herschell's formula when good judgment demanded that it should be obviated. In *Glanzer*

[42] Supra, note 14.

[43] Reno v. Bull, supra, note 18.

v. Shepard, the defendant incorrectly certified the weight of beans. The plaintiff paid out his money upon such certificate; and when he discovered the error sued the defendant, the weigher, for what he had lost on account of the error. The court had little difficulty in holding the defendant responsible. It suggested the possibility of employing several theories which would reach the same end. The contract for weighing being between the defendant and the seller, the court could not easily employ the contract and warranty theories unless it made use of the third party beneficiary device.[44] It turned, seemingly, to a negligence theory as based upon *MacPherson v. Buick Motor Co.*[45]—a theory based upon the duty to use reasonable care in view of the danger involved. It would doubtless have been difficult, however, for the plaintiff to have proved that the defendant was negligent except as determined by the fact that an error was actually made. Thus, as in the *MacPherson* case, it was necessary to rely upon the inferences to be drawn from the error itself as making out negligence. In the *MacPherson* case, the worm-eaten wheel constituted a *res ipsa loquitur* situation; in the *Glanzer* case the error in the weight of the beans probably served the same purpose. But the error having been proved, would the court have allowed the defendant to make any excuse by way of showing that he had not violated his duty to use reasonable care? In such cases the

[44] Lawrence v. Fox, 20 N. Y. 268 (1859).

[45] 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916).

doctrine of negligence is as exacting as the doctrine of peril.[45a] The guess is hazarded that under no circumstances in such a case could the defendant have excused himself. Hence, it is suggested that the negligence theory as employed in *Glanzer v. Shepard* was in fact but a screen which permitted the court to employ a doctrine equivalent to the "innocent misrepresentation" doctrine, but in a way to avoid embarrassment from its seeming adherence to the formula in *Derry v. Peek*. It is rather striking that the court does not advert to the "deceit" theory at all. The case illustrates the wealth of legal theories at the command of courts generally, as well as the great capacity which the Chief Judge of the New York Court of Appeals and his associates have demonstrated on many occasions for utilizing legal theories without destroying their integrity as means of articulating more acceptable judgments.[46]

[45a] Since this article was written, the New York Court of Appeals, in Doyle v. Chatham & Phenix National Bank of City of New York, 253 N. Y. 369, 171 N. E. 574 (1930), has more than warranted the comments made with reference to Glanzer v. Shepard. The whole opinion is very interesting. The court concludes as follows: "It seems clear, therefore, that within the authorities cited, the defendant, in so far as its certificates constituted misrepresentation of fact, innocently though negligently made, became liable to the takers of the bonds who invested their moneys upon the faith of the certificates." In other words, under the current methods of promoting investment security companies, something far more stringent than the statement formulated in Derry v. Peek is required in order to protect those who would invest.

[46] McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928); International Products Co. v. Erie

The New Hampshire court, apparently due to the influence of Judge Jeremiah Smith,[47] has amended its "scienter" formula to permit recovery for "negligent misstatement." [48] It is not apparent that anything has been gained by this amendment. The case first cited is clearly a transaction between an expert and a layman, the expert assuming to know about a matter as to which he should have known or else kept quiet. It is believed that he would have been held under any of the "deceit" formulas, including that of *Derry v. Peek*. The New Hampshire court has probably done nothing more than develop the third clause of that case which imposes liability if the defendant's misstatement is made "recklessly, careless whether it be true or false." [49] But there is no objection to the use of the doctrines of negligence when they afford any advantage. There is no conflict between their use and that of other doctrines. They merely afford additional machinery by which to handle the cases.

Professor Williston is probably as insistent upon a general doctrine approximating the warranty theory for all cases as Professor Bohlen is upon the negligence theory for the "honest misrepresentation" cases. In discussing the

R. Co., supra note 8 (the interest here was in a relation with a third party); Hynes v. New York Cent. R. Co., 231 N. Y. 229, 131 N. E. 898, 17 A. L. R. 803 (1921); 57 A. L. R. 7, note (1928); 17 A. L. R. 833, note (1921).

[47] Smith, loc. cit. supra, note 6.

[48] Weston v. Brown, 82 N. H. 157, 131 A. 141 (1925); Maxwell Ice Co. v. Brackett, Shaw & Lunt Co., 80 N. H. 236, 116 A. 34 (1921).

[49] See Derry v. Peek, supra, note 17.

many inconsistencies to be found in the cases, he says: "It is impossible that such a situation can be allowed to exist permanently. Some method of harmonizing the different doctrines must be worked out. * * * It is a just ground of reproach to the law if a harmonious doctrine cannot be developed." [50] Perhaps something can be done by way of formulating clearer hypotheses, but with types of transactions demanding a range from the strictest warranty to mere good faith or reasonable belief, or even less, it would be impossible to make any general formula which would cover all of them. On the other hand, a series of formulas for different types of cases as variant as human conduct itself would necessarily be confusing and soon come to appear contradictory. While the present classifications and formulas hold out a false assurance of precision in dealing with the cases, yet this much can be said for them: First, the terminology is familiar, and for purposes of *statement* is decisive; second, the courts are free to do with a case what seems most acceptable for the time and place. If one theory will not work, another will; and once the theory is indicated, little further explanation is required. Judgment can therefore be made decisive with a minimum of effort by way of articulation.

INTENT

The fourth element requiring the representation to be made "for the purpose of inducing the plaintiff to act" is entirely distinct from the purpose to defraud, deceive,

[50] Williston, op. cit. supra, note 13, at 415, 434.

or injure the plaintiff, or to benefit the defendant. The defendant's motive is beside the point.[51] This element has little, if any, significance, apart from identifying the party who may rely upon it. If the representation is reasonably calculated to induce reliance on the part of the plaintiff, that is enough. While it must be made for the purpose of inducing the *plaintiff*, and not someone else,[52] the plaintiff may be one of a class of persons whose reliance might be said to be probable.[53] The element might be discarded altogether by transferring what little significance it has, if any, beyond bounding the general scope of the formula,[54] to the element of "inducement." [55]

INDUCEMENT

Whether the plaintiff was induced to act upon the defendant's representation is the question of causal relation in its simplest form. It is usually stated in terms of the plaintiff's reliance,[56] and such reliance may be merely re-

[51] Smith v. Chadwick, 9 App. Cas. 187 (1884); Polhill v. Walter, 3 Barn. & Ad. 115, 110 Eng. Rep. 43 (K. B. 1832); Foster v. Charles, 7 Bing. 105, 131 Eng. Rep. 40 (C. P. 1830).

[52] Hindman v. First Nat. Bank, 112 F. 931, 57 L. R. A. 108 (C. C. A. 6th, 1902); Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822 (1902); Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436 (1865).

[53] Leonard v. Springer, 197 Ill. 532, 64 N. E. 299 (1902); Polhill v. Walter, supra, note 51.

[54] See discussion infra relevant to notes 65, 66, 67, 68, and particularly 69.

[55] See discussion infra under "inducement."

[56] Maxwell Ice Co. v. Brackett, Shaw & Lunt Co., supra, note

fraining from action as well as acting.[57] Moreover, the defendant's representation may be only one of multiple factors which impel the plaintiff's reliance.[58]

A very serious limitation upon the plaintiff's right of recovery is interposed at this point. *Should* the plaintiff have relied upon the defendant's representation? Suppose he himself knew the representation to be false? All courts agree that if the plaintiff knew of the falsity of the representation, he cannot recover. Some say he could not be induced thereby; others that he will not be heard to say that he was induced. But suppose he actually relied upon the representation when he could have discovered its falsity by investigation? All sorts of situations arise at this point. The earlier decisions were inclined to put a heavy burden upon the plaintiff to protect himself, as expressed in the doctrine of *caveat emptor*. If the plaintiff could have discovered the falsity by investigation, investigation being open, or if he undertook to investigate for himself, he could not recover.[59] The plaintiff was thus precluded by a sort of "assumed risk" theory of defense. In case of "actual

48; Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040 (1904); Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138 (1884); Hagee v. Grossman, 31 Ind. 223 (1869); Addington v. Allen, 11 Wend. (N. Y.) 374 (1833).

[57] Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788 (1901).

[58] Ochs v. Woods, 221 N. Y. 335, 117 N. E. 305 (1917).

[59] Collins v. Jackson, 54 Mich. 186, 19 N. W. 947 (1884); Schwabacker v. Riddle, 99 Ill. 343 (1881); Graffenstein v. Epstein & Co., 23 Kan. 443, 33 Am. Rep. 171 (1880); Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105 (1873); Sherwood v. Salmon, supra note 15.

fraud" this defense has been practically eliminated in the later decisions,[60] except in those cases in which it can be said that the plaintiff did not rely at all upon the defendant's representation but made an independent investigation on his own behalf unhindered by the defendant,[61] and in those cases in which the representations may be construed as mere "opinions." [62] The doctrine is frequently assimilated to that of contributory negligence. If negligence is the basis of the defendant's representation, this is an apt way of treating the defense,[63] but as most courts do not talk of "deceit" cases in terms of negligence, the theory of "assumed risk" is probably more appropriate. The idea is that in sales and credit transactions it is common knowledge that the defendant may be in error or that his representations may be exaggerated or otherwise those of a partisan trader. Therefore, the opposite party assumes such risks if he deals in reliance upon the defendant's representation without further investigation.[64]

[60] Halsell v. First Nat. Bank of Muskogee, 48 Okl. 535, 150 P. 489, L. R. A. 1916B, 697 (1915); Crawford v. Armacost, 85 Wash. 622, 149 P. 31 (1915); Judd v. Walker, 215 Mo. 312, 114 S. W. 979 (1908); Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593 (1894).

[61] Shepard v. Goben, 142 Ind. 318, 39 N. E. 506 (1895); Farrar v. Churchill, 135 U. S. 609, 10 S. Ct. 771, 34 L. Ed. 246 (1890); Carondelet Iron Works v. Moore, 78 Ill. 65 (1875).

[62] See supra, notes 59 and 60.

[63] Maxwell Ice Co. v. Brackett, Shaw & Lunt Co., supra, note 48.

[64] Nichols v. Lane, 93 Vt. 87, 106 A. 592 (1919).

DAMAGES

There must be damage as a result of the reliance upon the defendant's representation. The methods of ascertaining the amount of damages necessarily vary with the type of case. Much confusion results from the insistence upon the sufficiency of one or two formulas for all cases. There are two general formulas frequently employed. One allows the plaintiff to recover the difference between what he has paid and what he would have received had the representations been true.[65] The other allows him to recover only the difference between the value of the article received and what he paid.[66] The first is called the contract-warranty rule, inasmuch as it gives the deceived plaintiff the value of his bargain. The second is called the tort rule and allows the plaintiff to recover only his loss. Though they usually are treated as inconsistent, they need not be. There is a place for each. Neither is sufficient for all cases, and modifications are constantly made to meet the needs of varying situations.[67]

[65] Estes v. Odom, 91 Ga. 600, 18 S. E. 355 (1893); Antle v. Sexton, 137 Ill. 410, 27 N. E. 691 (1891); Morse v. Hutchins, 102 Mass. 439 (1869); Molnar v. Beriswell, 122 Ohio St. 348, 171 N. E. 593 (1930).

[66] Reno v. Bull, supra, note 18; George v. Hesse, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456 (1906); Smith v. Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. Ed. 279 (1889); 8 L. R. A. (N. S.) 804, note (1906).

[67] Kerr, op. cit. supra, note 16, at 511 et seq.; 34 Dickinson L. Rev. 181 (1930).

QUESTIONS OF LAW AND FACT

All of these five elements (the third being passed over for later discussion) usually give rise to jury questions which are called "questions of fact." If there is any issue made as to them by the evidence, the judge must submit them to the jury with appropriate instructions. It is concerning the formulation of such instructions that most divergencies arise. If the evidence raises no issue, or the evidence is so conclusive that only one reasonable inference can be drawn, the judge should exercise his own power of disposing of the point.

And it must be kept in mind that the judge has another distinct function in dealing with these elements, which though not frequently called into play, is of the utmost importance. It involves the determination of the *scope* of the general formula, or some one of its elements. It comes into play in the marginal cases. It requires the judge to say what sort of conduct can be considered as condemned under the rules which are employed in such cases. It is the function through which the formulas and rules themselves were evolved, through which their integrity is maintained and their availability determined. This function was required in the early case of *Pasley v. Freeman* [68] in determining whether false representations by a third person concerning the financial responsibility of a prospective purchaser were actionable in deceit. Did the plaintiff have any protection against such a risk under a deceit action?

[68] 3 Durn. & E. 51, 100 Eng. Rep. 450 (K. B. 1789).

The same sort of problem arose recently in an action for the failure of the defendant, a dentist, to inform the plaintiff that a tooth which he had extracted while the plaintiff was under the influence of ether had gone down her throat.[69] Such also was the question in *Swift v. Rounds*,[70] as to whether purchasing goods on a credit without intending to pay for them, but with no word or promise of any sort other than as could be implied from the defendant's conduct, was a false representation. In *Krause v. Cook*,[71] under the "innocent misrepresentation" doctrine, it became necessary to decide whether an agent who makes a false representation innocently, falls within the purview of the doctrine. In *Wells v. Cook*,[72] the court's sole difficulty was in deciding whether the representation made to the plaintiff *while acting as an agent for his brother* in the purchase of the sheep could be relied upon by plaintiff in his *own* transaction. The plaintiff later purchased the same sheep from his brother and found them to be diseased. This sort of problem may arise with reference to any one of the elements of the general formula. When it does arise it is conceded to be a "question of law" which the judge must decide.

Most "deceit" cases fall well within the boundaries of

[69] Tulloch v. Haselo, supra, note 5.

[70] 19 R. I. 527, 35 A. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791 (1896).

[71] 144 Mich. 365, 108 N. W. 81 (1906). See Aldrich v. Scribner, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379 (1908), for interpretation. See, also, Wimple v. Patterson (Tex. Civ. App.) 117 S. W. 1034 (1909).

[72] Supra, note 52.

the general formula. The usual questions are those of pleading, of evidence to support the pleadings, and of instructions to the jury covering the issues. If the plaintiff successfully pleads and supports his pleadings by evidence, and the judge properly submits the case, the decision of the case rests with the jury. Although it is the most important function in the case to perform, this ultimate decision is called a "question of fact." It is a single function, but it comprehends judgment on all the elements as to which issues may be developed. The theory is that the jury "find the facts" and "*apply the law.*" The figurativeness of this language for many minds successfully obscures the actual function which the jury perform. Whatever it may be called, the jury pass judgment on the defendant's conduct in the case before them and settle the plaintiff's claims, and their decision is final, so long as their deliberations are unimpeached and their assessment of damages is not unreasonable. They have the power to find for or against either party. Assuming that the case falls well within the limits of the formula so far discussed, the judge can do little more than translate the issues and give such additional cautions as the procedure of the particular jurisdiction may permit.

MATERIALITY

The "material fact" element has been left for separate discussion both on account of its importance as well as the marked complexity found in its employment. This is the element which gives the formula its highest flexibility. It is the one through which the judge may most effectually

make use of his power of judgment and thereby exercise so great a check upon responsibility in fraud cases. It is the key factor of a deceit action. The Maine court states the point clearly:[73]

"* * * Most of the questions involved in an action for deceit are questions of fact for the jury. Whether the defendant made the alleged false representation, and whether, if he made it, he knew it to be false, and whether the plaintiff was ignorant of its falsity, and whether he relied upon it, and was thereby damaged, are undoubtedly questions of fact for the jury. But, assuming all these facts to be proved, the *materiality* of the representation is a question of law for the court. * * *" (Italics ours.)

The devices which the judges have developed at this point to permit an effective control of legal responsibility are several. They all take the form of distinctions drawn against the term "fact"; they are all important; and they all allow wide room for judgment. First, the representation may be "immaterial" as opposed to "material."[74] Second, the representation may be as to a "promise" or "intention" and not one of "present fact."[75] Third, the

[73] Caswell v. Hunton, 87 Me. 277, 32 A. 899, 900 (1895); see also Rand v. Michaud, 122 Me. 65, 118 A. 893 (1922).

[74] Hall v. Johnson, 41 Mich. 286, 2 N. W. 55 (1879); Ochs v. Woods, supra note 58. The question of what is a "matter of fact" or "material fact" is discussed fully in Bower, Actionable Misrepresentations (2d Ed. 1927) Chap. II. Also see § 136, at 146.

[75] Fruit Dispatch Co. v. Wolman, 124 Me. 355, 128 A. 740 (1925); Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366 (1882);

representation may be an "opinion" and not one of "fact." Under the last are many sorts of "opinion": (a) of "law," [76] (b) of "value," (c) of "quantity," (d) of "quality," and others.[77] There are few difficult cases which do not offer the judge the opportunity to determine the limits of legal responsibility at some one of these points. Under this element, by making some one of these distinctions, a judge can more effectually bound the limits of legal protection in deceit cases and either dispense with or more

Sallies v. Johnson, 85 Conn. 77, 81 A. 974, Ann. Cas. 1913A, 386 (1911); Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743 (1889); Edgington v. Fitzmaurice, 29 Ch. D. 459 (1885); Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105 (1873); (1926) 26 Col. L. Rev. 103.

[76] Dernehl & Sons Co. v. Detert, 186 Wis. 113, 202 N. W. 207 (1925); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N. W. 905 (1924); Kehl v. Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158 (1904).

[77] The cases are numerous. Connelly Co. v. Schlueter Bros., 69 Mont. 65, 220 P. 103 (1923); Hogan v. McCombs Bros., 190 Iowa, 650, 180 N. W. 770 (1921); Dorr v. Cory, 108 Iowa, 725, 78 N. W. 682 (1899); Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853 (C. C. A. 2d, 1918); Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166 (1881); Mahardy v. McHugh, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487, 132 Am. St. Rep. 484, 16 Ann. Cas. 500 (1909); Andrews v. Jackson, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390 (1897); Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113 (1887); Medbury v. Watson, 6 Mete. (Mass.) 246, 39 Am. Dec. 726 (1843); Judd v. Walker, supra, note 66; Schumacker v. Mather, 133 N. Y. 590, 30 N. E. 755 (1892); Smith v. Land Corporation, 28 Ch. D. 15 (1884); Graffenstein v. Epstein & Co., supra, note 59; Picard v. McCormick, 11 Mich. 68 (1862); Sherwood v. Salmon, supra, note 15.

effectually control the judgment of a jury than under all the other elements combined. If his judgment dictates no responsibility in the particular case, he has these devices at hand for use in articulating his judgment. If he is of the contrary opinion, he can readily leave the case to the jury on other points, if an issue is made.[78] If he is in doubt on this point, he may require the concurrence of the jury.[79] As a matter of practice, under the exigencies of the general verdict and due to lack of sharp delineation of the several elements of the formula, in most cases the "material fact" element goes along with the rest of the case to the jury. And it makes no difference in the "mine run" of cases.[80] But in the marginal cases in which it is desirable that the bounds of responsibility be marked, judges normally do not surrender this power. They hang on to it. Where they seem to submit this problem to the jury it is usually done under an issue of "materiality" which when analyzed is the causal relation element, *viz.*, whether the representation *actually induced the plaintiff to act*.[81] The material fact problem is also submitted when

[78] National Bank of Pawnee v. Hamilton, supra, note 27.

[79] McCabe v. Kelleher, 90 Or. 45, 175 P. 608 (1918); Ward v. Jenson, 87 Or. 314, 170 P. 538 (1918); Hedin v. Minneapolis Medical & Surgical Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628 (1895).

[80] Kornblau v. McDermant, 90 Conn. 624, 98 A. 587 (1916) (whether claim came within terms of representation submitted to jury, but harmless); Davis v. Davis, 100 Mich. 162, 58 N. W. 651 (1894); Endsley v. Johns, 17 Ill. App. 466 (1885) (harmless).

[81] Wagner v. Binder (Mo. Sup.) 187 S. W. 1128 (1916); Fottler v. Moseley, supra, note 56; Hall v. Johnson, supra, note 74. See 26 C. J. 1102–1103. A good example of this sort of thing is

the language used is ambiguous or what was said is in dispute.[82] The situation at this point is parallel to the submission of the meaning of a provision of a contract which is ambiguous or where the language employed is in dispute.[83] Also, when a case is turned on a misrepresentation of a present intention, belief, or opinion, it is for the jury to decide if a doubtful question.[84] But it is clear that when such a question is submitted, the judge has already determined that the misrepresentation of such intention, belief or opinion, *if it does exist,* is a "material fact," and that is the larger question.

found in Bower, op. cit. supra, note 74, Chap. VI. The author treats "inducement" and "materiality" as two separate questions. But his treatment is confused. This is due to the fact that there is a section in the English Code (Sec. 18) which deals with "materiality." The issue of inducement necessarily involves the idea of materiality, i. e., was the misrepresentation effective. The latter is what the author deals with. But the element of "material fact" is dealt with in the first six articles of the Code and is commented upon by the author under the head of Representations, Chap. II. The only question in Section 18 of the Code that goes to the question of materiality is whether the representation was capable of inducing and that is pertinent to the first six sections of the Code. See Sec. 31(iii). The other phases of Section 18 are pertinent to inducement.

[82] Moon v. McKinstry, 107 Mich. 668, 65 N. W. 546 (1895).

[83] First Nat. Bank of Redlands v. Bowers, 141 Cal. 253, 74 P. 856 (1903); Globe Works v. Wright, 106 Mass. 207 (1870); Thurston v. Thornton, 1 Cush. 89 (Mass. 1848).

[84] Pacific Gas & Electric Co. v. Almanzo, 22 Ariz. 431, 198 P. 157 (1920); Stubbs v. Johnson, 127 Mass. 219 (1879).

CONCLUSION

Whatever disposition may be made of a case, the elaborate formula with its multitude of sub-formulas with their variations which have been evolved, permit the judge to range as freely as his judgment dictates. The trial judge need only fear the technique of the reviewing court. Inasmuch as there are numerous points in nearly every case at which differences of technique can affect judgment, the appellate court has almost as wide opportunity to determine the result as does the trial judge. A court need put no greater store by the form of words than it desires.[85] Justice Lamm of the Missouri Supreme Court, in a case as remarkable for its good sense as for its wit, puts the matter graphically:[86]

"* * * Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit. * * * Accordingly definitions

[85] Stonemets v. Head, supra, note 12; Belka v. Allen, 82 Vt. 456, 74 A. 91 (1909).

[86] Stonemets v. Head, supra, note 12, 248 Mo. 243, 154 S. W. at page 114. See similar statements by Lord Chancellor Hardwicke in Lawley v. Hooper, 3 Atk. 278, 279, 26 Eng. Rep. 962, 963 (Ch. 1745). See Howard v. Scott, 225 Mo. 685, 125 S. W. 1158, 1165 (1910); Clyce v. Anderson, 49 Mo. 37, 40 (1871).

of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers."

As indicated by the decline in the reliance upon the phrase "*caveat emptor*" of the last century, there has been the widest departure in these cases from the earlier conservative attitude of both laymen and judges. Commerce and business generally—those who sell and buy and who must rely upon credit—have come to rest heavily upon trust and confidence. The courts are no longer doubtful of their administrative devices to handle the litigation which comes from the insistence upon a more refined morality and a stricter justice. Much of the talk of the judges in many of the earlier cases, and in some of the later ones in which the judges were evidently influenced by the earlier language, sounds strange. Perhaps much of this language has made judges feel that it was necessary to find ways to leave troublesome cases to juries, so that the jury, unembarrassed by history, might do what the judge would like to see done. Nor can there be found much complaint against this attitude, for probably juries are as well fitted to pass upon questions which arise in deceit cases as in any other kind, and also the function juries serve best in the judicial process is that of a "shock absorber" as required here. Who can censure the judge for what the jury do? What effective criticism can be made of a jury after their judgment is rendered and they have dissolved into the world of citizenship? The next jury will be a different one and may be better.

But the point to be stressed here is that *whatever sort*

of judgment is desired, the formulas which have been evolved and their coteries of attendant phrases provide the most flexible accommodation without in the least impairing their own integrity, if any, or that of the judicial process. A science of law could ask little better by way of intellectual machinery for handling these varied and difficult cases.

CHAPTER 11

ASSAULT AND BATTERY

In so far as the interest of personality is protected, by the award of damages, from harms inflicted by threats, insults, offensive touchings, blows, wounds, attacks, fights, etc., which are ordinarily classified as assaults and batteries, it is done under one of the most flexible formulas employed by courts. The range of variation is so wide here, and the integrity of one personality may be so nicely balanced by the integrity of another, that nothing less than the most flexible formula would suffice. To state this formula with such precision that it should comprehend all that must be taken into account in dealing with the infinite variety of cases which have arisen and continue to arise, is doubtless impossible. But it is also unnecessary. The prime value of the formula lies in the facilities it affords for breaking a case into bits to accommodate the division of labor by the judge and jury. For this purpose a master formula need not reflect all the nice shadings which it makes possible. With slight variations, such a formula may be stated as follows:

A defendant who (1) intentionally invades (2) the plaintiff's person (3) by physical contact (or (4) puts him in apprehension of an invasion of his person (5) by threat of immediate physical contact) (6) without plaintiff's consent, (7) and not in the reasonable defense of defendant's own person or (8) other interest, and (9) not in the per-

formance of some duty imposed by law, or (10) the exercise of some privilege by reason of the relation of the parties (11) is liable in damages to the plaintiff.

At a glance it is apparent that the elastic words employed permit the widest play at every step. Moreover, a case can scarcely be imagined which would not call for judgment at multiple points. It may be a close judgment at that. And of first importance here, as in other cases, is the question of whose judgment shall determine the points developed in the particular case. There are few instances in which an answer to that question can be stated with assurance in advance of actual determination by the judicial process. The greatest reliance a lawyer has in these cases is an acquaintance with the uses to which the formula has been put so that he may insist that his case be subjected to it intelligently. But even the most intelligent handling of a case can not insure the outcome, for most cases reach the jury on one or more issues, and, in view of the latitude allowed by the general verdict, there is little that can be done to prevent a jury's judgment from controlling the case as a whole.

1. *Intention*

With respect to the requisite of intention, as other requisites, the judge will exercise his normal functions, first to determine what sort of conduct falls within the requisite, and second to determine whether the evidence raises an issue of its existence. On either question he may turn the case definitely against the plaintiff, but if all requirements are favorable to plaintiff on the first, and there is

an issue raised on the second, it must go to the jury. These rulings are classed as "questions of law," while an issue for the jury is termed a "question of fact," even though it be thought necessary for the jury, in making their determination, to make use of the instructions given by the judge.

The intention required need go no further than the purpose to invade the integrity of plaintiff's personality, though ordinarily there is also the desire to produce hurt other than a mere invasion.[1] Where intentional conduct leaves off and negligent conduct begins is an imaginary line which can only be located in the particular case. In fact, the problem in close cases is whether the conduct should be condemned, and this may be done under any one of several formulas.[2] Neither intention nor negli-

[1] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47 (1891).

[2] Johnson v. Mack, 141 Mich. 99, 104 N. W. 395 (1905); Goold v. Saunders, 196 Iowa, 380, 194 N. W. 227 (1923). In the latter case the court says: "It was a mistake, however, to suppose that there was a necessary inconsistency between such an assault and negligence. Intentional assault is a graver wrong than an unintentional negligence. The quality of negligence is often included in intentional and even criminal wrongs. In such a case, the negligence is submerged, so to speak, and thereby disappears, though it still exists, like a submerged mount on the floor of the sea." A most remarkable confirmation of this idea is found in Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. —— (1930), in which the Supreme Court construed the provision of the Merchant Marine Act extending to seamen the remedies provided under the Federal Employers' Liability Act to railway employees. Plaintiff was a seaman who had been given a blow by defendant's foreman. The court, speaking through Justice

gence are closed concepts; each has many gradations within itself which are sought to be indicated by appropriate word coloring, such as malicious, wanton, wilful, reckless, gross, careless, presumptive, constructive, and many other qualifying terms. A practical joke resulting in bodily hurt or apprehension of such hurt is sufficient to meet the requirement of intention.[3] The fact that the plaintiff was mistaken for some one or something else does not negative the intention to harm the plaintiff.[4] But there must be such intention as makes the conduct that of the defendant. Contact with plaintiff or apprehension to him brought about through some other agency without defendant's desire or through his incapacity does not constitute such an invasion.[5] The conduct need not be directed against the

Butler said: "• • • The question is whether 'negligence' as there used includes the assault in question. • • • 'Negligence' is a word of broad significance and may not readily be defined with accuracy. • • • As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act." See, also, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S. E. 680 (1928).

[3] Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484 (1902).

[4] Seigel v. Long, 169 Ala. 79, 53 So. 753, 33 L. R. A. (N. S.) 1070 (1921); White v. Levarn, 93 Vt. 218, 108 A. 564, 11 A. L. R. 1219 (1918).

[5] Gibbons v. Pepper, 4 Mod. 405 (1695); Slattery v. Haley, 3 Dom. L. R. 156 (1923). But insanity does not prevent a lunatic's conduct from constituting a battery. Sauers v. Sack, 34 Ga. App. 748, 131 S. E. 98 (1925). Cf. Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577 (1899). See Bohlen,

plaintiff but may be directed against some other person.[6] When plaintiff is hurt by violence directed by defendant toward another, it is sometimes said that defendant's intent is transferred from the person against whom it was directed, to plaintiff. This idea of transferred or constructive intent is, of course, a fiction. It simply means that in many cases a purpose to invade the plaintiff's interests is unnecessary, but this doctrine has proved troublesome. It permits needed expansion of the term "intention," but it is hard to delimit. It has frequently been said that whenever the defendant is engaged in an unlawful act he is liable for all the consequences of his conduct, or that a person is presumed to intend the direct consequences of his unlawful act. With the increasing catalog of unlawful acts, this form of statement allows too much expansion; it can not be followed through.[7] There are not many cases, if any, in which it is necessary to go beyond the statement that defendant is responsible for the harm caused plaintiff, whether by contact or fear of contact, if it was "probable" that his conduct would imperil the per-

Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924).

[6] Talmadge v. Smith, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414 (1894); Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76 (1899); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244, 250 (1924); Vandenburgh v. Truax, 4 Denio (N. Y.) 464, 47 Am. Dec. 268 (1847); Bannister v. Mitchell, 127 Va. 578, 104 S. E. 800, 16 A. L. R. 768 (1920); Scott v. Shepherd, 2 W. Bl. 892 (1772).

[7] Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197, 44 A. L. R. 1407 (1927); Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701 (1911).

son of any one situated as was the plaintiff. This form of statement is not of long standing, nor is it used in a great many cases, but it would seem sufficiently elastic to allow full freedom of judgment in the particular case, and that is the primary value of such a formula. It avoids the harshness of the other frequently suggested limitations and doubtless suffices as a rational basis for the cases, aside from those involving the use of firearms.[8]

The quest for formulation has probably been unduly emphasized, as though judgment were thereby controlled. It is hardly to be conceived that a standardized formulation for all cases is either possible or desirable. Normally the inquiry comes down to a "question of fact," and the objective should be to employ the most apt means for translating the particular problem to the jury's intelligence for judgment. That done, the methods of appellate courts in articulating their results through opinions is of slight importance. There is nothing disturbing in the ever increasing terminology employed in such cases; judgment is but finding a larger freedom of expression.

2. *The Person*

Every part of the physical person is inviolate. It is

[8] See Brown v. Kendall, 6 Cush. (Mass.) 292 (1850). In the firearms cases there has always been an insistence upon the strictest sort of formula. Weaver v. Ward, Hob. 134 (1616); Isham v. Dows Estate, 70 Vt. 588, 41 A. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691 (1898) and cases cited; Hawksley v. Peace, 38 R. I. 544, 96 A. 856, L. R. A. 1916D, 1179 (1916). Cf. Stanley v. Powell (1891) 1 Q. B. 86; Sullivan v. Creed, (Ir. Rep. 1904) 2 K. B. 317.

frequently said that the clothing which a person has on,[9] the cane he carries,[10] his watch or other articles attached to him, are identified with his person, and that touching them is an invasion of the person. Whatever part of the personality can be subjected to the physical touch falls within the protection of the formula. The judge does not need the aid of laymen at this point.

3. *Physical Contact*

This element requires that for a *battery* there must be a physical contact. Such contact may range from the most violent wound inflicted by a deadly weapon to the slightest offensive touching.[11] The touching of anything closely connected with the person, as the clothing, cane, a leash by which a dog is held, or the cutting or jerking of a rope held in the hands or about the body, the striking of a horse on which another is riding or has harnessed to a vehicle in which he is seated, involves all the physical contact that is required.[12]

[9] United States v. Ortega, Fed. Cas. No. 15,971, 4 Wash. C. C. 531 (1825).

[10] Respublica v. De Longchamps, 1 Dall. 111, 1 L. Ed. 59 (1874).

[11] Richmond v. Fisk, 160 Mass. 34, 35 N. E. 103 (1893) (defendant awakened plaintiff to collect milk bill); Dyk v. De Young, 35 Ill. App. 138 (1889) (snatching paper out of another's hands); State v. Monroe, 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 Am. St. Rep. 686 (1897) (eating candy).

[12] Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612 (1882); Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S. E. 680 (1928); Laubrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645, L. R. A. 1915E, 812 (1915); Cole v. Turner, 6 Mod. 149, 87 Eng. Rep. 907 (1704).

4. *Apprehension of Physical Contact*

When we pass from actual contact to threatened contact (from battery to assault) the cases may prove more complex. The apprehension required is not fear. A courageous man may have no fear or he may know that he can escape or beat off his assailant. It is sufficient if there is apprehension of a violation of the integrity of the person, however slight.[13] While in the cases that come before the court there is normally fear of some serious consequence, such is not required. It was once said in this connection that there must be present ability on the part of the defendant to inflict the violence offered and that apprehension was not enough. This was later stated as apparent ability to inflict the violence.[14] The qualification seems to go to the reasonableness of the apprehension, but it is believed that if defendant's conduct is construed as a threat, nothing more is required than that the particular plaintiff must be in apprehension. In other words, if the defendant intends to put plaintiff in apprehension he would be held even though plaintiff were a highly excitable person and even though a normal person would not have been put in apprehension by his conduct.[15] But again, the paper statement of this requisite is of minor importance:

[13] Mailand v. Mailand, 83 Minn. 453, 86 N. W. 445 (1901); Howell v. Winters, 58 Wash. 436, 108 P. 1077 (1910).

[14] Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373 (1853); Kline v. Kline, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397 (1902).

[15] Reed v. Coker, 13 C. B. 85 (C. P. 1853); Trogdon v. Terry, 172 N. C. 540, 90 S. E. 583 (1916); U. S. v. Richardson, 5 Cranch, C. C. 348 (1837). But see Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577 (1899).

however it may be worded, the judge or jury have the power to read into it or not the result they desire on the whole case.

5. *Threat of Immediate Physical Contact*

The conduct must be intended to put plaintiff in apprehension of an immediate invasion of his person in order to meet the requirement. If there is no intention [16] or no apprehension,[17] the doctrine of transferred or constructive intent would not be recognized at this point. Also, words alone are not sufficient threats, even though insulting.[18] Words must be part of a larger train of conduct, but it takes very little in addition to words to make them threats.[19] Gestures, grimaces, words spoken from concealment may well constitute an assault. But words may

[16] Chapman v. Hargrove (Tex. Civ. App.) 204 S. W. 379 (1918). Cf. Keep v. Quallman, 68 Wis. 451, 32 N. W. 233 (1887).

[17] State v. Barry, 45 Mont. 598, 124 P. 775, 41 L. R. A. (N. S.) 181 (1912).

[18] Republic Iron & Steel Co. v. Self, 192 Ala. 403, 68 So. 328, L. R. A. 1915F, 516 (1915); Reimenschneider v. Neusis, 175 Ill. App. 172 (1912); Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278 (1915); Reed v. Maley, 115 Ky. 816, 74 S. W. 1079, 62 L. R. A. 900, 2 Ann. Cas. 453 (1903); Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703 (1880); Leach v. Leach, 11 Tex. Civ. App. 699, 33 S. W. 703 (1895); Hixson v. Slocum, 156 Ky. 487, 161 S. W. 522, 51 L. R. A. (N. S.) 838 (1913); Galvin v. Starin, 132 App. Div. 577, 116 N. Y. S. 919 (1909); Jeppsen v. Jensen, 47 Utah, 536, 155 P. 429, L. R. A. 1916D, 614 (1916).

[19] See Kramer v. Ricksmeier, 159 Iowa, 48, 139 N. W. 1091, 45 L. R. A. (N. S.) 928 (1913); Johnson v. Sampson, 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 772 (1926); Janvier v. Sweeney [1919] 2 K. B. 316.

negative conduct, as the classic instance, "If it were not assize time I would not take such language from you," accompanied by defendant's placing his hand on his sword.[20] The defendant, however, runs all the risk of his words so negativing his conduct in plaintiff's understanding, and likewise of his conduct negativing his words.[21] Acts may speak louder than words, and if plaintiff should be deaf, or excited, or unable to understand the language, doubtless the words spoken would not negative the effect of the conduct. On the other hand, to one who could not see, conduct might well be ineffectual in qualifying the effect of words.

No distance in space can be prescribed in determining immediacy. The means of doing violence to the person are too many, but it must be near enough in space so that the threat can be executed almost instantly.[22] Neither can the time limit be more precisely stated. In clear cases the court can merely say that the time or distance was too great, or the contrary. The doubtful cases must fall to the jury. The idea involved is that there must be imminent danger of contact from which plaintiff could not escape without either the voluntary desistance of defendant, the intervention of a third party, or the compliance.

[20] Tuberville v. Savage, 1 Mod. 3 (1669).

[21] State v. Hampton, 63 N. C. 13 (1868); Ross v. Michael, 246 Mass. 126, 140 N. E. 292 (1923); Handy v. Johnson, 5 Md. 450 (1854); Keep v. Quallman, 68 Wis. 451, 32 N. W. 233 (1887); Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896).

[22] Stevens v. Meyers, 4 Car. & P. 349 (1830); State v. Davis 23 N. C. (1 Ired.) 125, 35 Am. Dec. 735 (1840); Keefe v. State, 19 Ark. 190 (1857).

effective resistance, or retreat by plaintiff himself.[23] If the apprehension is of future harm, even though delayed no longer than such time as plaintiff can safely escape, then there is no satisfaction of this element. Judgment at this point, as on most of the other points, is ordinarily for the jury. The form of statement, however accurate, leaves the greatest room for evaluating the evidence in finding the "facts." No two judges or juries need agree in judgment, even on highly similar situations, however much agreement may be insisted upon in stating the formula.

6. *Without Plaintiff's Consent*

There are severe limitations upon responsibility for the types of harms under consideration. These limitations have been doctrinalized under the terms "consent" and "privilege." The idea of consent is that if one who is mentally competent submits himself voluntarily to the invasion of his person by defendant, there is no responsibility for such invasion on defendant's part. There are decided differences of opinion among the courts as to the instances in which this limitation is available. It is clear that "consent" is not a single concept, nor is it always a controlling factor, and if it were so made, the soundness of such a limitation would be highly questionable. In ordinary play, athletic games, the mingling and congregation of people in their numerous activities, constant con-

[23] State v. Dooley, 121 Mo. 591, 26 S. W. 558 (1894); French v. Ware, 65 Vt. 338, 20 A. 1096 (1893); U. S. v. Richardson, 5 Cranch, C. C. 348 (1837).

tacts are inevitable.[24] Sometimes they involve serious consequences.[25] Nevertheless protection is not given against them except in the clearest cases in which the defendant has deliberately or negligently gone far beyond normal conduct.[26] The idea that these numerous contacts are "consented" to is probably wide of the mark. We doubt less consent to them because they are the inevitable incidents of our life against which government cannot offer any worth-while protection. Hence we leave the risks where they fall.

When one submits himself to a physician or surgeon for examination or operation, consent is probably apt enough to limit the responsibility of the medical man. But consent is not required for his protection if the person is in such state that he cannot give consent and yet his condition demands immediate treatment in order to save his life or to prevent serious bodily impairment.[27] In

[24] Cole v. Turner, 6 Mod. 149, 87 Eng. Rep. 907; Briese v. Moechtle, 146 Wis. 89, 130 N. W. 893, 35 L. R. A. (N. S.) 574, Ann. Cas. 1912C, 176 (1911); Coward v. Baddeley, 4 Hurl. & N. 478 (1859).

[25] McAdams v. Windham, 208 Ala. 492, 94 So. 742, 30 A. L. R. 194 (1922); Fitzgerald v. Cavin, 110 Mass. 153 (1872).

[26] May v. Yurek, 32 Ohio App. 293, 168 N. E. 59 (1929); Markley v. Whitman, 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558 (1893); Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267 (1870); Reid v. Mitchell, 12 Sess. Cas. 1129 (1885).

[27] Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. (N. S.) 290 (1912); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303 (1905). In Pratt v. Davis, 224 Ill. 300, 79 N. E. 565, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197 (1906), the court says it is the

emergencies, consent is "implied," even though it is clear that the person would not give it if he were competent to do so.[28] In cases involving matters of sex (assault, seduction and rape) consent plays a large part. It limits defendant's responsibility in these cases except where by statute the age of consent is fixed.[29] In both the medical and sex cases consent does not operate as a defense if it were gotten through fraud or by duress.[30] The counter limitations upon consent take a wide range.[31]

In cases of abortions (illegal operations) the consent of the patient is held in some states to limit the responsibility of the person performing the abortion,[32] while in others it is not so held.[33] Likewise, in fights it is held by some

surgeon's "duty to perform such operations as good surgery demands, without such consent."

[28] Bennan v. Parsonnet, 83 N. J. Law, 20, 83 A. 948 (1912); King v. Carney, 85 Okl. 62, 204 P. 270, 26 A. L. R. 1032 (1922); Delahunt v. Finton, 244 Mich. 226, 221 N. W. 168 (1928). Cf. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197 (1906); Wells v. Van Nort, 100 Ohio St. 101, 125 N. E. 910 (1919).

[29] Herman v. Julian, 117 Kan. 733, 232 P. 864 (1925); Bishop v. Liston, 112 Neb. 559, 199 N. W. 825 (1924).

[30] Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762 (1899); Cadwell v. Farrell, 28 Ill. 438 (1862).

[31] Bye v. Isaacson, 42 N. D. 417, 173 N. W. 754, 6 A. L. R. 1067 (1919).

[32] Szadiwicz v. Cantor, 257 Mass. 518, 154 N. E. 251, 49 A. L. R. 958 (1926).

[33] Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N. E. 264, 33 A. L. R. 53 (1924); Martin v. Hardesty (Ind. App.) 163 N. E. 610 (1928). The French courts do not permit the consent of the party to protect surgeons who perform beauty operations; probably the American courts will follow the same theory. Beau-

jurisdictions that the entering upon the fight is consent to take the hurts inflicted and there can be no recovery,[34] while other states hold that like the illegal operation, this is an "unlawful act," and one cannot give consent to a crime so as to defeat his recovery for the hurt.[35] The rule on the criminal side is clear that the state cannot be precluded by such consent of the parties. But opinion in civil litigation is greatly divided.

Consent may be as good a term as any by which to label these varying cases, so long as it is not taken too seriously. What are the factors which limit responsibility in the one case and not in the other? This sort of inquiry is usually dropped with the assertion that it is a matter of public policy. That does not suffice. What is the public policy that requires these distinctions? Nor does that quite reach the point. *Why is the formula so stated that judgment in the particular case will be as little restricted as possible?*

The factors in these cases are numerous. In the physician and surgeon cases, at least in part, there is a question of control of those who have the care and superintendence

ty operations are outside the field of health and do not require the protection to the surgeon that health operations demand. Beauty and health are put upon different planes.

[34] Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581, (1896); Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286 (1902); see Ann. 6 A. L. R. 393.

[35] McCulloch v. Goodrich, 105 Kan. 1, 181 P. 556, 6 A. L. R. 386 (1919); Colby v. McClendon, 85 Okl. 293, 206 P. 207, 30 A. L. R. 196 (1922); Teolis v. Moscatelli, 44 R. I. 494, 119 A. 161 (1923); Logan v. Austin, 1 Stew. (Ala.) 476 (1828).

of the human body for health purposes. They constitute a highly developed profession. They must not be curtailed by rigid rules which may impair their usefulness. Nor must too much power be placed in the hands of those who might be disposed to blackmail. At the same time the irresponsible members of the profession, who would use these immunities to carry on unlawful practices, should be curbed. The adjustment is hard to make in terms of rules; no rigid line can be drawn. The judges seem inclined to leave the doctors to regulate themselves. Probably the judges feel that the doctors are better able to deal with all but the most extreme cases than are either juries or the judges themselves. A review of the decisions indicates few cases in which the doctors have been made to respond in damages.[36] It may well be that in the future the medical profession may be subjected to a stricter control by the courts. There are indications looking in that direction.

The sex cases (seduction, abortions, bastardy) also present questions of interminable variety in an increasingly complex society. Courts can only undertake control in the extreme cases. Consent or no consent, society must and does find more effective safeguards than the courthouse to protect its females and off-spring against the thousand

[36] Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197, 44 A. L. R. 1407; Gill v. Selling, 125 Or. 587, 267 P. 812, 56 A. L. R. 1556 (1928); Benson v. Dean, 232 N. Y. 52, 133 N. E. 125 (1922); London v. Scott, 58 Mont. 645, 194 P. 488, 12 A. L. R. 1487 (1920); Guell v. Tenney, 262 Mass. 54, 159 N. E. 451 (1928). But see Hively v. Higgs, 120 Or. 588, 253 P. 363, 53 A. L. R. 1052 (1927); Throne v. Wandell, 176 Wis. 97, 186 N. W. 146 (1922).

harms which grow out of the fact of sex. Formal government cannot give much help.

Fights present difficulties also. The offer of a fight is to have it accepted. To refuse a civil remedy means that there is practical immunity to those who desire to fight except in the more serious cases which reach the criminal courts. On the other hand, to give a civil remedy would seem likewise to promote fights inasmuch as what one lost in the fight he might be compensated for in the courthouse. The doctrines of self-defense and the doctrines of provocation, mitigation, and the other so-called damage doctrines, are so adequate by way of making adjustments in the amount of the recovery, if any, that it is doubtful whether there is any necessity for a doctrine of "consent" in these cases.[37]

7. *Self-Defense*

Limitations upon responsibility for intentional invasions of another's personal integrity developed under the doctrine of the self-defense privilege are important. They are not hard to state, but there is disagreement as to the form of statement. A person attacked or threatened may use such means to protect himself as are reasonable under the circumstances, but must not use severer means than are reasonably necessary for such protection.[38] The rub

[37] Knitig v. Slaven, 128 Kan. 466, 278 P. 727 (1929); Royer v. Belcher, 100 W. Va. 694, 131 S. E. 556, 47 A. L. R. 1089 (1926); Wise v. Daniel, 221 Mich. 229, 190 N. W. 746 (1922); Thomas v. Carter, 148 Miss. 637, 114 So. 736 (1927).

[38] Morris v. Platt, 32 Conn. 75 (1864); Morris v. Miller, 83

comes at two places: (1) When are the circumstances such that a person is entitled to act at all? [39] (2) When are the means of defense employed excessive? What is the penalty for acting too quickly or too decisively? The first difficulty is the hardest but it involves primarily only the form of statement. Shall the circumstances be viewed from the defendant's point of view? All courts agree that it should. But shall the statement be what was reasonable to the defendant,[40] or what would have seemed reasonable to an ordinary prudent man in defendant's place? [41] Much time and effort have been spent at this point but it is largely wasted. The inquiry when it reaches this point is clearly one for the jury if the judge is doubtful, either as to the availability of the defense or as to the inferences to be drawn from the evidence. *Whatever the form of statement employed in translating the question to the jury, the jury can only judge of the defendant's conduct from their own point of view as to what his conduct should have been from the picture the evidence develops for them. The nice point*

Neb. 218, 119 N. W. 458, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047 (1909).

[39] Chapman v. Hargrove (Tex. Civ. App.) 204 S. W. 379 (1918); Crabtree v. Dawson, 119 Ky. 148, 83 S. W. 557, 67 L. R. A. 565, 115 Am. St. Rep. 243 (1904).

[40] McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503, 14 L. R. A. (N. S.) 689 (1906); Brown v. U. S., 256 U. S. 335, 41 S. Ct. 501, 65 L. Ed. 961, 18 A. L. R. 1276 (1921); Modesett v. Emmons (Tex. Com. App.) 292 S. W. 855 (1927); Taylor v. Franklin, 208 Ky. 13, 270 S. W. 462 (1925). Cf. Chapman v. Hargrove (Tex. Civ. App.) 204 S. W. 379 (1918).

[41] Morris v. Platt, 32 Conn. 75 (1864); Beck v. Scott, 185 Iowa, 401, 170 N. W. 770 (1919).

in statement would seem to be immaterial; the jury's judgment is doubtless seldom affected by the way the question is put. The same difficulty is involved in the *excessiveness* of defendant's conduct and may be the subject of quibbling also.[42]

The judge here, as elsewhere, determines the limits of the defense by either allowing defendant's conduct to be considered by a jury, or by excluding the defense from their consideration because either the conduct is too far aside to be permitted under the doctrine, or else is too clear to make an issue. Ordinarily, however, the jury gets the question, for self-protection may take any form that attack itself may take, and inasmuch as defendant's own evidence is sufficient to make an issue, it is usually made. Assuming that the form of statement the court employs to transmit the defense to the jury is acceptable, the jury may do what it pleases from accepting the defense fully to denying it fully, with the greatest power of tempering responsibility by moderating the amount of damages. This limitation like all the others is inextricably bound up with the assessment of damages and its network of doctrines.

8. *Defense of Other Interests*

Other than in identity of the interests, the problems here are the same as in self-defense. When action is necessary and when excessive, and the scaling of damages in accord-

[42] Gernolus v. Sausser, 83 Minn. 141, 85 N. W. 946 (1901); Hopper v. Dowling, 191 Iowa, 57, 181 N. W. 759 (1921); Lorenz v. Hunt, 89 Cal. App. 6, 264 P. 336 (1928); Lide v. Parker, 6 La. App. 648 (1927).

ance as the jury think the particular situation requires, all are involved. But the interests here are diverse. All courts recognize the interventions of a defendant to protect a close relative the same as defense of self.[43] Here the interest in the relation with others is apparent. It extends to interference by employer to protect an employee, and vice versa.[44] And, so far as has been discovered, the idea is extended to intervention on behalf of any other person, at least when so seriously threatened as to involve a felony, even to the extent of taking life if such be necessary.[45] Probably a greater degree of necessity is exacted in case of interference on behalf of strangers than of relatives, but that would be cared for probably by the tighter judgment rather than by serious alteration of formula and statement.

The privilege is extended to the protection of chattels or possession of land, and even to regaining possession of both. Courts have attempted nice gradations here,[46] but

[43] Roberson v. Stokes, 181 N. C. 59, 106 S. E. 151 (1921); Sloan v. Pierce, 74 Kan. 65, 85 P. 812 (1906).

[44] Frew v. Teagarden, 111 Kan. 107, 205 P. 1023 (1922); Malley v. Lane, 97 Conn. 133, 115 A. 674 (1921).

[45] Hoecker v. State, 79 Tex. Cr. R. 78, 183 S. W. 141 (1916); 5 C. J. 752.

[46] Arlowski v. Foglio, 105 Conn. 342, 135 A. 397, 53 A. L. R. 481 (1926); Chambers v. Bedell, 2 Watts & S. (Pa.) 225, 37 Am. Dec. 508 (1841); Green v. Goddard, 2 Salk. R. 640; McIlvoy v. Cockran, 2 A. K. Marsh. (Ky.) 271 (1820); Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272 (1876); Hemmings v. The Stoke-Poges Golf Club [1920] 1 K. B. 720; Mosseller v. Deaver, 106 N. C. 494, 11 S. E. 529, 8 L. R. A. 537, 19 Am. St. Rep. 540 (1890); see A. L. R. annotation 316; Hannabalson v. Sessions,

after all is said, outside of bounding the extreme limitations, as much as trial courts can do is to transmit the questions to the jury in acceptable terms. Probably in this instance as much as any other, intricate doctrinal refinements are utilized by appellate courts as means of controlling the disposition of cases.

9. *In the Performance of Duty*

Officers of the law, and citizens generally called upon by officers to assist them, and persons authorized under the law to make arrests in certain cases clearly have an immunity for the hurts they may inflict while in the performance of such duties. There are numerous limitations. But these are so bound up with the abuses of governmental processes that they can not be given attention here. Inasmuch as agencies of government itself are involved, it may be anticipated that the formulas employed in these cases are neatly enough developed so that the judges are permitted a maximum of control.

10. *Privilege by Reason of the Relation of the Parties*

There are certain well recognized relations, as parent and child, husband and wife, teacher and pupil, master and seaman, and possibly others, in which there are privileges

116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250 (1902); Kirby v. Foster, 17 R. I. 437, 22 A. 1111, 14 L. R. A. 317 (1891); Stanley v. Payne, 78 Vt. 235, 62 A. 495, 3 L. R. A. (N. S.) 251, 112 Am. St. Rep. 911, 6 Ann. Cas. 501 (1905); Hemingway v. Hemingway, 58 Conn. 443, 19 A. 766 (1890); Geissler v. Geissler, 96 Wash. 150, 164 P. 746, 166 P. 1119 (1917); McLean v. Colf, 179 Cal. 237, 176 P. 169 (1918).

of invasion of the person of one of the parties to the relation which would not be countenanced outside the particular relation. In some of these cases privileges are practically complete limitations upon responsibility.[47] In others the privilege must be exercised reasonably. In all these cases the judge under his power to determine the scope of the privilege plays a dominant part.

11. *Damages*

The assessment of damages is highly important. There are three general classes: (1) Nominal, (2) compensatory, (3) exemplary. The first is primarily to vindicate plaintiff's claim, but there being no hurt other than this, the damages are very small, as 1 cent or 6 cents or $1. Usually such damages cast the costs upon defendant, but not always so.

Compensatory damages are by way of paying the plaintiff for the harms he has suffered. The methods of measurement are at best only approximate. The jury's estimate so long as given in accordance with the proprieties exacted of a jury and not patently outrageous will be accepted.[48] Exemplary damages may be given in any case of this group in which the defendant's conduct has been outrageous. The theory is that they are a penalty exacted by way of

[47] See William E. McCurdy, "Torts between Persons in Domestic Relations", 43 H. L. R. 1030 (May 1930) for extended discussion as to parent and child, and husband and wife. Brown v. Howard, 14 Johns. (N. Y.) 119 (1917) (master and seaman).

[48] Knitig v. Slaven, 128 Kan. 466, 278 P. 727 (1929).

punishment of defendant as an example to others. If not too heavy they will be sustained.[49]

But through both compensatory and exemplary damages in these cases there runs the doctrine of mitigation which allows the jury to scale the damages by way of compensation and punishment according to the element of provocation or unwarranted conduct on the part of plaintiff.[50] It permits extraneous facts to be shown which give the setting of the whole relation of the parties a more comprehensive scope and enables the jury to take into account a great deal of data which cannot be allowed for in the statement of the various doctrines and their limitations pertinent to these cases. And it might be added that, whether it is recognized expressly or not, juries do in fact take into consideration the whole case and its surroundings in so far as they know them. The protective safeguards thrown around inquiry into the general verdict make such a practice invulnerable.

Conclusion

Instead of a few simple cases of assault and battery with a few simple rules, as is normally assumed, the cases in everyday life require an extensive formula with numerous sub-formulas, in which are developed the nicest sort of in-

[49] Mitchell v. Randal, 288 Pa. 518, 137 A. 171 (1927); Gilham v. Devereaux, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381 (1923).

[50] See Royer v. Belcher, 100 W. Va. 694, 131 S. E. 556, 47 A. L. R. 1089 (1926) for the doctrine that mitigation is limited to exemplary damages. At best, an instruction to this effect, can be only a fatuous performance upon the part of the judge. A jury's reactions to strong evidence are not so easily controlled.

quiries and questions for judgment. Instead of a single nicely delineated process for every case, there is rather a complex group of processes out of which a pattern can be adjusted for almost any case that may arise. Adjustment depends upon a choice of any number of combinations of competitive doctrines with their respective limitations. Adjustment may come to seem practically automatic, but as a matter of fact what makes it seem so is the skill (or at least the power) of the persons making it. There are multiple theories and doctrines, all of which have functions in enabling judge and jury to pass judgment and to equalize such judgment by means of assessing the damages. The problem of stating them acceptably is important yet secondary to the larger inquiry: (1) For what purpose are they stated; and (2) how does their statement influence the judgment to be passed? All legal theories serve functions; in broad summary, all eventuate in "questions of law" or "questions of fact."

CHAPTER 12

MALICIOUS PROSECUTION

An action for "malicious prosecution" is to vindicate the plaintiff's interests against the defendant's conduct for wrongfully setting the judicial process in motion against the plaintiff. The interest of personality may be involved, i. e., the integrity of the person; also not infrequently plaintiff's interests in relations with others (honor, reputation, free speech, business relations) are involved in such suits; and now and then a property interest. The formula as usually stated requires plaintiff to maintain that defendant (1) prosecuted plaintiff, (2) without probable cause, (3) with malice, and (4) with favorable termination to plaintiff, (5) but to his damage.[1] There is a tendency in cases in which one or more of these requisites is absent, as for instance the termination of the suit favorably to plaintiff,[2] to call the action by the name of "abuse of process." Usually such cases involve an attempt by the defendant to employ the judicial process for some purpose other than that for which it purports to serve.[3] Either name is suf-

[1] Glenn v. Lawrence, 280 Ill. 581, 117 N. E. 757 (1917); Stephens v. Conley, 48 Mont. 352, 138 P. 189, Ann. Cas. 1915D, 958 (1914).

[2] Lambert v. Breton, 127 Me. 510, 144 A. 864 (1929).

[3] Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, 49 L. R. A. (N. S.) 753, Ann. Cas. 1915A, 830 (1913) (attachment for preventing transfer of property. See note 27 Harv. L. Rev. 593); Chatham Estates v. American Nat. Bank, 171 N. C. 579, 88 S. E.

ficient and most courts disregard the minor differences in requisites.[4]

There is no other cause of action which is more carefully guarded. Unfortunate defendants who are wrongfully subjected to the judicial process must bear that risk except in the most extreme cases. When such a defendant in turn becomes plaintiff he has an uphill fight to maintain his suit. The reasons are not hidden far beneath the surface. They are mostly administrative:[5] (1) To encourage citizens to seek the protection of their interests and the interests of the community in the courts without fear of being them-

783 (1916) (lis pendens filed to prevent plaintiff from selling or using lands for security); Glidewell v. Murray-Lacy & Co., 124 Va. 563, 98 S. E. 665, 4 A. L. R. 225 (1919) (arrest to enforce collection of debt); see Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S. E. 829 (1928).

[4] In Keller v. Butler, 246 N. Y. 249, 158 N. E. 510, 55 A. L. R. 349 (1927) (arrest of plaintiff for extradition as fugitive from justice) the New York Court of Appeals speaking through Justice Crane puts the matter sensibly: "Names and classifications of remedies are not indispensable to a court, although they may be convenient and necessary for the student. Justice may not tarry to tabulate. The fact is, such a wrong must have a remedy. It is provided either in the action for malicious prosecution or in an action for abuse of process." Shaw v. Moon, 117 Or. 558, 245 P. 318, 45 A. L. R. 600 (1926); Hall v. American Inv. Co., 241 Mich. 349, 217 N. W. 18 (1928); Kittler v. Kelsch, 56 N. D. 227, 216 N. W. 898, 56 A. L. R. 1217 (1927). See, also, Chatham Estates v. American Nat. Bank, supra note 3.

[5] Lister v. Perryman, L. R. 4 H. L. 521 (1868) (Lord Colonsay); Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242 (1898); Shedd v. Patterson, 302 Ill. 355, 139 N. E. 705, 26 A. L. R. 1004 (1922); Annotation L. R. A. 1915D, p. 11.

selves subjected to the hazards of litigation; (2) to question the integrity of the law's administration is a serious matter not to be lightly sustained; (3) it is desirable to let the settlement of the principal litigation settle all collateral matters. Strict, uniform, and expert rulings are at a premium in these cases. Judges play a dominating part in handling them. "Questions of law" and "questions of fact" take on different hues here from that found in most other cases.

1. *The plaintiff must show that defendant prosecuted him.* Whether defendant was a prosecutor or merely a complaining witness,[6] or whether what defendant did amounted to such a prosecution as to fall within the protection of the rules [7] are questions for the court. It is necessary to bound the limits of this action as it is that of

[6] Dickson v. Young (Iowa) 221 N. W. 820 (1928); King v. Martin, 150 Va. 122, 142 S. E. 358 (1928).

[7] Halberstadt v. New York Life Ins. Co., 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102 (1909) (issuance of warrant for arrest); Strain v. Irwin, 195 Ala. 414, 70 So. 734 (1915); Tiede v. Fuhr, 264 Mo. 622, 175 S. W. 910 (1915); Segusky v. Williams, 89 S. C. 414, 71 S. E. 971, 36 L. R. A. (N. S.) 230 (1911); Hocker v. Welti, 239 Ill. App. 392 (1926) (suborning witness to swear falsely); Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279 (1876) (same); Fusario v. Cavallaro, 108 Conn. 40, 142 A. 391 (1928) (conspiracy to swear falsely). See Kintz v. Harriger, 99 Ohio St. 240, 124 N. E. 168, 12 A. L. R. 1240 (1919); Landis v. Wolf, 206 Ill. 392, 69 N. E. 103 (1903) (injunction); Kittler v. Kelsch, 56 N. D. 227, 216 N. W. 898, 56 A. L. R. 1217 (1927) (immunity of district attorney); Yaselli v. Goff (C. C. A. 2d) 12 F.(2d) 396, 56 A. L. R. 1239 (1926), annotation 56 A. L. R. 1255 (immunity of prosecuting officers).

others.[8] Institution of criminal prosecutions,[9] bankruptcy proceedings,[10] lunacy proceedings,[11] seizure of property under attachment or other process,[12] suing out of search warrants,[13] and the like are well recognized as sufficient to meet these requirements. The institution of an ordinary civil suit in absence of the seizure of property or special damage is not such a prosecution in many jurisdictions,[14] even though the same suit be repeatedly instituted.[15] But in many other jurisdictions it is.[16] These questions are not without difficulty, but they have been very well de-

[8] Dissent of Justice Bradley in Stewart v. Sonneborn, 98 U. S. 187, 199, 25 L. Ed. 116 (1878).

[9] Chambers v. Robinson, 2 Strange, 691 (1726) (faulty indictment); Steward v. Gromett, 7 C. B. (N. S.) 191 (1859) (incarceration in absence of peace bond); Humphries v. Edwards, 164 N. C. 154, 80 S. E. 165 (1913); cases supra, note 7.

[10] Stewart v. Sonneborn, supra n. 8; Quartz Hill Cons. Gold Mining Co. v. Eyre, (L. R. 1882) 11 Q. B. D. 674.

[11] Barton v. Woodward, 32 Idaho, 375, 182 P. 916, 5 A. L. R. 1090 (1919) (Annotation 1097.)

[12] Tomlinson v. Warner, 9 Ohio, 104 (1839); Martin v. Rexford, 170 N. C. 540, 87 S. E. 352 (1915).

[13] Shaw v. Moon, supra note 4; Whitson v. May, 71 Ind. 269 (1880).

[14] Wetmore v. Mellinger, 64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465 (1884); Jerome v. Shaw, 172 N. C. 862, 90 S. E. 764, L. R. A. 1917B, 749 (1916).

[15] Pye v. Cardwell, 110 Tex. 572, 222 S. W. 153 (1920) (note, 30 Yale L. J. 1310). But see Sheid v. Patterson, 302 Ill. 355, 139 N. E. 705, 26 A. L. R. 1004 (1922).

[16] Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615 (1897); Eastin v. Bank of Stockton, 66 Cal. 123, 4 P. 1106, 56 Am. Rep. 77 (1884).

fined. The facts being ascertained, whether they meet this requirement is for the judge.

2. *The most important element in the formula is that the prosecutor must have acted without probable cause.* The plaintiff must maintain the burden of showing this negative. If the prosecutor has "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense," that is sufficient.[17] The point does not turn on guilt or innocence but upon the *belief* of the prosecutor concerning such guilt or innocence. Such belief must be reasonable, and depends upon what defendant knew or believed at the time.[18] He can get no advantage of what later transpired as supporting the reasonableness of his belief.[19] This part of the formu-

[17] Carl v. Ayers, 53 N. Y. 14 (1873); Foshay v. Ferguson, 2 Denio (N. Y.) 617 (1846); Chapman v. Anderson, 3 F.(2d) 336, 55 App. D. C. 165 (1925); Potter v. Seale, 8 Cal. 218 (1857); McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926).

[18] Rawson v. Leggett, 184 N. Y. 504, 511, 77 N. E. 662 (1906)

[19] There is a serious qualification here. If plaintiff is actually guilty, then of course that is a defense which can be shown even though defendant had no probable cause for instituting prosecution and even though plaintiff was lucky enough to procure a favorable outcome. The action was designed for the benefit of the innocent and not of the guilty. But plaintiff does not have affirmatively to show his innocence; the favorable termination of the suit is enough for that. His actual guilt is a defense which rests upon defendant. Newton v. Weaver, 13 R. I. 616 (1882); Mack v. Sharp, 138 Mich. 448, 101 N. W. 631, 5 Ann. Cas. 109 (1904); White v. International Text Book Co., 156 Iowa, 210, 136 N. W. 121, 42 L. R. A. (N. S.) 346 (1912).

la sounds like an inquiry into the factual details of the case much as is required by "reasonable care" in negligence cases. The two are very similar, but in malicious prosecution under the orthodox practice the judge passes on the question of reasonableness,[20] while in negligence cases the jury passes judgment on this question. Frequently the testimony is in conflict as to the details. Under the exigencies of the general verdict the question of "probable cause" must then be presented to the jury.[21] It is here called a "mixed question of law and fact." [22] The theory is that the judge instructs the jury as to what constitutes probable cause, and if the jury find certain facts such will satisfy the requirements, while if certain other facts are found the requirements will not be satisfied. In other words, the instructions are hypothetical, the judge retaining his power to say what, out of the facts of the case, will constitute probable cause, but leaving it to the jury to find those facts. The jury are supposed to pass on the conflicting evidence and abide by the instructions. What the jury do is never known except in cases into which now and then for some reason it is found possible to make inquiry into their deliberations. In the great multitude of

[20] Cloon v. Gerry, 13 Gray (Mass.) 201 (1859); Hayes v. Ketron, 223 Ky. 119, 3 S.W.(2d) 172 (1928); Brodrib v. Doberstein, 107 Conn. 294, 140 A. 483 (1928); Molton Realty Co. v. Murchison, 212 Ala. 561, 103 So. 651 (1925); Rowe v. Glen Elder State Bank, 126 Kan. 291, 267 P. 998 (1928); Michael v. Matson, 81 Kan. 360, 105 P. 537, L. R. A. 1915D, 1 (1909) (annotation).

[21] See annotation L. R. A. 1915D, p. 12.

[22] Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116 (1878). See annotation L. R. A. 1915D, p. 43.

cases the jury finds for plaintiff or defendant on the whole case, and that ends the matter if there is no error in other respects.[23]

It is in allocating the functions of court and jury at this point that most of the difficulties in malicious prosecution cases arise. The theory which allows the judge to exercise the fullest power of judgment at this point is the orthodox one and is believed to be desirable. The majority of courts give allegiance to the statement: "When the facts are undisputed, probable cause is a question of law for the court." But in actual practice probable cause is still presented to the jury in many cases because the exigencies of the general charge and general verdict make it almost impossible not to do so. As stated in a recent New Jersey case:[24] "Where, as here, the question whether or not the defendant had probable cause for instituting the prosecution against the plaintiff depends, in part at least, upon facts the existence of which are in dispute, it is the function of the jury to settle those facts, and, upon doing so, *to determine on the whole case whether or not probable cause has been shown;* such determination being based upon proper instructions from the trial court." There is

[23] Bennett v. Pillion (N. J.) 144 A. 601 (1929); Wendel v. Metropolitan Life Ins. Co., 83 Mont. 252, 272 P. 245 (1928); McGarr v. E. V. Schnoor Cigar Co., 125 Kan. 760, 266 P. 73 (1928); Oliver v. Graham, 127 Kan. 125, 272 P. 162 (1928); Hall v. American Investment Co., 241 Mich. 349, 217 N. W. 18 (1928); Peterson v. Fleming, 222 Mo. App. 296, 297 S. W. 163 (1927). See annotation L. R. A. 1915D p. 58.

[24] Bennett v. Pillion (N. J.) 144 A. 601 (1929).

a strong minority of courts that insist that the practice here is no different from that in other cases, and that not only when the evidence is conflicting, *but also when more than one reasonable inference can be drawn from it*, the case must go to the jury.[25] The New York Court of Appeals has given great weight to this position.[26]

But to protect themselves against jury judgments when they are not desired, courts have devised many ways of obviating the necessity of submitting a case on the probable cause issue. There are many rules of thumb which prove convenient at this point. If, for instance, the prosecutor

[25] Wilson v. Thurlow, 156 Iowa, 656, 137 N. W. 956 (1912); see annotation L. R. A. 1915D 43, 58.

[26] In Heyne v. Blair, 62 N. Y. 19 (1875) the court in a per curiam opinion said: "It is pre-eminently a question for the judgment of twelve men to determine what, upon a doubtful state of facts, or upon facts from which different men would draw different conclusions—that is, upon facts capable of different inferences—would be the belief and action of men of ordinary caution and prudence. Such is the rule in all questions of the like character, and there is no reason why this class of action should form an exception to the rule." Carl v. Ayers, 53 N. Y. 14 (1873) relied on, did not support this statement, but in the latter case the Court of Appeals held the evidence showed a want of probable cause. But Heyne v. Blair made the departure in New York that requires all questions of probable cause, on evidence subject to more than one inference, to be submitted to the jury. Galley v. Brennan, 216 N. Y. 118, 110 N. E. 179 (1915); Burns v. Wilkinson, 228 N. Y. 113, 126 N. E. 513 (1920); Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 136 N. E. 219 (1922). Note Judge Crane's dissent on whether evidence subject to different inferences. Dean v. Kochendorfer, 237 N. Y. 384, 143 N. E. 229 (1924); Hyman v. New York Cent. R. Co., 240 N. Y. 137, 147 N. E. 613, 39 A. L. R. 858 (1925).

consulted legal counsel, and, after a fair disclosure of the facts, counsel advised that there was a basis of prosecution, in most jurisdictions this is conclusive evidence of probable cause, even though counsel's advice was erroneous.[27] Even here, however, if there is a basis for inferring that the prosecutor did not go to counsel in good faith, or did not act upon his advice in good faith, or counsel did not give advice in good faith, the question will go to the jury upon that phase.[28] Belief by defendant in plaintiff's responsibility is an essential to probable cause.[29] Also, if the trial court in the first case found against plaintiff, such a judgment, in most states, is conclusive that there was probable cause even though the judgment is reversed on appeal, unless plaintiff can show fraud of some sort in obtaining the judgment against him.[30] Binding plain-

[27] Chapman v. Anderson, 3 F.(2d) 336, 55 D. C. App. 165 (1925); Brodrib v. Doberstein, 107 Conn. 294, 140 A. 483 (1928); Simmons v. Gardner, 46 Wash. 282, 89 Pac. 887, L. R. A. 1915D, 16 (1907); Price Mercantile Co. v. Cuilla, 100 Ark. 316, 141 S. W. 194 (1911).

[28] Hopkinson v. Lehigh Valley R. Co., 249 N. Y. 296, 164 N. E. 104 (1928); Wilmer v. Rosen, 102 W. Va. 8, 135 S. E. 225, 49 L. R. A. 261 (1926); Ravenga v. Mackintosh, 2 Barn. & C. 693 (K. B. 1824).

[29] Haddrick v. Heslop, 12 Q. B. 268, 116 Rep. 869 (1848); Burt v. Smith, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576 (1905). As to failure to make investigation of facts before instituting prosecution, see annotation 5 A. L. R. 1688.

[30] Desmond v. Fawcett, 226 Mass. 100, 115 N. E. 280, L. R. A. 1917D, 408 (1917); Wilcox v. Gilmore, 320 Mo. 980, 8 S.W.(2d) 961 (1928, civil suit); Kennedy v. Burbidge, 54 Utah, 497, 183 P. 325, 5 A. L. R. 1682 (1919); Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 638, 114 Am. St. Rep. 711 (1906).

tiff over to the grand jury and the finding of an indictment are also prima facie evidence of probable cause in many states.[31] Nor is want of probable cause to be inferred from malice. If there is probable cause for the prosecution the existence of an evil motive on the part of the prosecutor is immaterial.[32]

With this wide choice there is little reason why judges who are acquainted with their functions should ever be embarrassed in finding a proper instrumentality for handling a case in the way they think it should be handled. Probably most cases for malicious prosecution are determined against plaintiffs on this point and that by the judgment of the judge at one stage or another. Many cases are reversed for lack of proper instructions on this point when the case is sent to the jury on some of its subordinate phases. What may turn the judge's judgment in a particular case can in no wise be predicted. He has at his command flexible procedural formulas for retaining the whole power of judgment to himself, or, if his judgment dictates, for calling a jury to his assistance either for a determination of the details or for their judgment upon the whole case. So far as rules are concerned, as little dependence is to be put in them here as elsewhere. Any consistency of judgment must depend upon the understand-

[31] Hopkinson v. Lehigh Valley R. Co., supra, note 28 (acquittal not evidence of want of probable cause). See Lewis v. Goldman, 241 Mass. 577, 136 N. E. 67, 24 A. L. R. 260 (1922). But see A. L. R. annotation for effect of discharge of committing magistrate.

[32] Burt v. Smith, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576 (1905).

ing which the judges have of the functions such rules are designed to serve.

3. *Second in importance in actions of malicious prosecution is the element of defendant's malice.* If there is any evidence to support this ground it is a question for the jury. Infrequently cases arise in which the court determines that there is no evidence of malice,[33] even though the court also rules that defendant had no probable cause for instituting suit.[34] This is true even though malice may ordinarily be inferred from want of probable cause.[35] On the other hand the facts may be so strong that the court will instruct that the prosecution was so unwarranted as to justify exemplary damages.[36] Malice does not submit readily to definition.[37] In his instructions the trial judge usually recites many well worn expressions concerning malice, among which will be found the one that "malice is the deliberate purpose to injure without just cause or excuse." Probably the idea here most significant is that if the prosecutor invoked the judicial process for some purpose other than bringing the plaintiff to justice or for protecting some interest of the prosecutor then he acted maliciously.[38] The

[33] Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662 (1906).

[34] Atkinson v. Birmingham, 44 R. I. 123, 116 A. 205, 36 A. L. R. 366 (1922); King v. Martin, 150 Va. 122, 142 S. E. 358 (1928).

[35] Vanderbilt v. Mathis, 12 N. Y. Super. Ct. 304 (1856); Schofield v. Ferrers, 47 Pa. 194 (1864).

[36] Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S. E. 829 (1928).

[37] Griswold v. Horne, 19 Ariz. 56, 165 P. 318, L. R. A. 1918A. 862 (1917). See, generally, Smith, Disparagement of Property, 13 Col. L. Rev. 121 (1913).

[38] Johns v. Marsh, 52 Md. 323 (1879); Mitchell v. Jenkins, 5

formula at this point presents the issue upon which the jury is entitled to pass judgment, and it is sufficiently broad that they can take into consideration the whole case as it appears to them. There is no reason to believe that they do less than weigh the whole case, or to wish that they should do less. When a case is strong enough otherwise to reach the jury, it is seldom that malice is not found. Probably, after all, the malice issue is merely the machinery for giving the judge a means of getting a concurrence of lay judgment in so important a matter as the abuse of judicial processes. Incidentally, it also lays a basis for the assessment of damages.

4. *The plaintiff must show that the prosecution terminated favorably to him.* The clearest cases are those of acquittal by a jury verdict or a direction by the court. But quashal or dismissal or abandonment is equally sufficient.[39] On the other hand, a compromise or settlement,[40] or an absence from the jurisdiction until the statute of limitations had run is not sufficient.[41] This question is for the judge unless the evidence is in conflict.[42]

Barn. & Adol. 588 (K. B. 1833). See, also, cases cited in notes 1, 2 and 3 supra.

[39] Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35 (1869); Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168 (1904).

[40] See White v. International Text Book Co., 156 Iowa, 210, 136 N. W. 121, 42 L. R. A. (N. S.) 346 (1912), for review of authorities of settlement under duress.

[41] Halberstadt v. New York Life Ins. Co., 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102 (1909).

[42] Winkler v. Lenoir & Blowing Rock Lines, 195 N. C. 673, 143 S. E. 213 (1928).

5. *The element of damages is normally for the jury.* It, of course, must be alleged,[43] but many of the cases involve the same sorts of interests as assaults, false imprisonment, libel and slander. The question of assessing damages here as in those suits is largely a matter of reasonable judgment and the jury have a free hand so long as they do not act outrageously.[44] In cases of wrongful attachment and interference with property interests causing loss of sale or loss of credit the difficulties are greater.[45] When a case is presented to a jury which meets all the exactions required of a plaintiff under the difficult steps of this type of action, the jury normally will respond with a liberal verdict.

The resort to the machinery of government for unwarranted vengeance upon a fellow citizen is one of the most severely condemned of all torts, both by judges and laymen. In so far as the awarding of damages can be utilized to prevent or compensate for the abuses of the judicial processes in these cases, all that is required is an intelligent judiciary to handle the machinery at hand. The "questions of law" and "questions of fact" lend themselves as neatly to the requirements of the individual case, as well as the process in its entirety, as intelligent judgment could well demand.

[43] Fetterly v. Brown, 204 Cal. 386, 268 P. 643 (1928).

[44] Rich v. Rogers, 250 Mass. 587, 146 N. E. 246, 37 A. L. R. 656 (1925).

[45] See Melcher v. Clark, 145 Wash. 95, 258 P. 1032, 54 A. L. R. 448 (Annotation p. 451) (1927).

CHAPTER 13

A NEW DEVELOPMENT IN JURY TRIAL[a]

Trial by jury is the distinctive contribution of the common law to the administration of law. Seven hundred years of development have not perfected it. The respective functions of judge and jury still present the most far-reaching and difficult problems of trial procedure; the most frequent to arise, and, strange as it may seem, the least understood. Assuming that the determination of the "facts" in lawsuits by every-day unprofessionalized citizens is the idea at the heart of trial by jury which has been uppermost in its long development,[1] it is remarkable what poverty in devising means for using such a group to that end has been exhibited by American legislators and judges.

GENERAL CHARGE AND GENERAL VERDICT

The normal method of employing a jury is through the process of a general charge and general verdict; and it is in this process that most of the difficulties have their source. As late as 1895, the Supreme Court of the Unit-

[a] This essay was first printed in 13 Am. Bar Ass'n Jr. 715 (1927).

[1] For the development of the jury through its many interesting stages see: 1 Holdsworth, History of English Law (1922), p. 312 et seq.; Thayer, Preliminary Treatise on Evidence (1898), Chaps. II–IV; Moschizisker, Trial by Jury (1922), Chaps. I–III.

ed States found itself divided on whether the jury had the right, as well as the power, to decide both the law and the facts in a criminal case.[2] The functions of neither judge nor jury can be performed accurately through the general charge and verdict, nor can any workable check on them be devised whereby litigants can be assured that the law has been properly administered to their disputes. The instructions of a judge to a jury normally relate to the law applicable to the possible findings of facts, stated hypothetically, which are supported by the evidence. In any but the simplest cases, they are long and involved, phrased in terms of the nicest distinctions, capable of being understood only by lawyers, and, more frequently than not, inaccurate. No one seriously claims that they are understood by juries or that they assist a jury in reaching a verdict. For most part they are ritual.[2a] Nevertheless, these instructions are the greatest single source of reversible error and both trial and appellate courts would be relieved of their greatest source of annoyance if the general charge could be eliminated from trial procedure.

But if the charge of the judge is incomprehensible to the jury, the jury's answer to that charge is inscrutable to the judge. Plaintiff or defendant wins; that is the

[2] Sparf v. United States, 156 U. S. 51, 715, 15 S. Ct. 273, 39 L. Ed. 343 (1894). See Sunderland, Verdicts, General and Special, 29 Yale L. J. 253 (1920). The constitutions of several states still accord the jury such right and power. Authorities cited, 16 Corpus Juris 921, § 2273.

[2a] For a peculiar example see Johnson v. State, 99 Tex. Cr. R. 25, 267 S. W. 713 (1924).

whole story. Prof. Sunderland has properly characterized the general verdict:[3]

"The peculiarity of the general verdict is the merger into a single individual residuum of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. * * * There are three unknown elements which enter into the general verdict: (1) the facts (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. No one but the jurors can tell what was put into it and the jurors will not be heard to say."

The general verdict may seem the more desirable for the very reason that it does conceal the operations of the jury; it does give a feeling of certainty and finality which cannot be inquired into. But if experience is worth anything, it has taught that despite all the secrecy of the jury room the verdicts of juries must constantly be set aside, with the cumbersome and expensive new trial as the only remedy, unless the error relate merely to the amount of damages awarded. Moreover, in those few jurisdictions where, even under great restrictions, the processes of the jury room may be shown, new trials are even more frequent, and if the processes of juries in arriving at gen-

[3] Verdicts, General and Special, 29 Yale L. J. 250 (1920).

eral verdicts under general charges were open to investigation, it is rather an easy guess that relatively few verdicts could stand. As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle.

SPECIAL VERDICT

The special verdict was invented as a means of escape by the jury from the attaint imposed upon the jury for rendering a false general verdict,[4] but at common law the jury could not be compelled to return a special verdict against their wishes. In most American jurisdictions, however, the judge may require a special verdict of the jury.[5] When employed, it must be complete; the jury must find all the material facts, disputed and undisputed, and not merely the evidence from which the facts can be inferred, nor mere conclusions. Nothing must be left for the judge to do except pronounce judgment upon the facts found. The changes which have been rung on these requisites are numberless, likewise unintelligent and futile. At bottom the special verdict represents a valuable idea, but as put into operation it has no vitality. To require such excessive exactness of a lay body, or even of lawyers, in the heat of trial, is to demand the impossible. Such requirements cramped the life out of the special ver-

[4] Clementson, Special Verdicts, Chap. 1 (1903); Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L. J. 588 (1923).

[5] Clementson, Special Verdicts, p. 8 (1903).

dict. While provision for it is found in most states, it is practically just so much dead weight. Had its development been normal it should have superseded the general verdict centuries ago.[6]

SPECIAL INTERROGATORIES

The practice of submitting special interrogatories to a jury grew out of an early New England practice of questioning the jury as to the grounds of their verdict.[7] There is a clear distinction between this practice and a special verdict.[8] A special verdict is in lieu of a general verdict and the sole basis of judgment; special interrogatories are merely in aid of a general verdict. They are never permitted except when a general verdict is returned and are designed to explain and test it.[9] The general verdict discloses nothing but the result of the jury's processes, but by directing special questions on specific issues to the jury their findings thereon will disclose how they dealt with those issues. Special interrogatories are thus given an important but an auxiliary part to play. The practice is authorized under the statutes of a majority of the states.[10] Its results are negative rather than positive. It, for most

[6] For full history of special verdict, see Clementson, Morgan, Sunderland, Thayer, supra notes 1, 3 and 4.

[7] Wicker, Special Interrogatories in Civil Cases, 35 Yale Law Journal 296 (1925); Clementson, Special Verdicts, Chs. II–III.

[8] Id.

[9] Clementson, Special Verdicts, Ch. IV (1903); Morbey v. Chicago & N. W. Ry. Co., 116 Iowa 84, 89 N. W. 105 (1902).

[10] See Wicker, supra N. 7, for full development.

part, merely gives the court an opportunity of checking up the jury's processes and prevents a jury from saddling responsibility on a party through a general verdict when their finding on a material point is inconsistent with such responsibility.[11] Special interrogatories expose the unreliability of the general verdict but add ponderousness to an already over-ponderous process. Innumerable refinements have been developed in their use and especially in determining when the general verdict is controlled by the special finding, and all in all, the practice rather tends to retard than to expedite the disposition of cases, and has not met any wide approval.

MODIFIED SPECIAL VERDICT

In three widely separated states—North Carolina, Texas and Wisconsin, a practice has been developed which offers a simple and easily administered substitute for the general and other forms of verdicts, with none of their weaknesses. In North Carolina this method is still called a general verdict,[12] but the jury are required to answer

[11] See Freedman v. New York, N. H. & H. R. Co., 81 Conn. 601, 71 A. 901, 15 Ann. Cas. 464 (1909); Callahan v. Jursek, 100 Conn. 490, 124 A. 31 (1924).

[12] C. S. N. C. § 585; Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272 (1887). At least one judge thought it neither a general nor special verdict. Witsell v. West Asheville & S. S. R. Co., 120 N. C. 557, 27 S. E. 125 (1897). The practice in Scotland is very similar. See Brodie-Innes, Comparative Principles of the Law of England, pp. 565–66 (1903).

only the few questions submitted to them by the judge. The questions are, for most part, not complex, few in number, and normally can be answered yes or no. In Texas the process is called submission on "special issues." [13] In Wisconsin it is called a special verdict.[14] Clearly the process is not a general verdict.

In North Carolina judge and counsel determine the issues to be submitted to the jury in advance of trial, and these issues govern the evidence to be admitted, argument of counsel, and the like.[15] The practice has been steadfastly adhered to there, and has enabled, more than any other factor perhaps, a very small judiciary to care for the litigation of one of the larger states.[16] The practice is clearly not the common law special verdict, though very similar to it, in that the jury are only asked to determine so-called fact issues, but is dissimilar in that only material disputed issues are found and the jury are only required to answer the questions propounded. Alongside this practice in North Carolina are found, similar to those

[13] Article 2189, Vernon's Ann. Civ. St. Tex. 1925. In Arizona there is a similar practice in equity cases. Costello v. Gleason, 15 Ariz. 280, 138 P. 544 (1914).

[14] Section 2858, St. Wis. 1921.

[15] Miller v. Miller, 89 N. C. 209 (1883); Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367 (1894); Beasley v. Surles, 140 N. C. 605, 53 S. E. 360 (1906); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897).

[16] The trial judges of the Superior Courts of the state numbered 12 in 1871 and 20 in 1926, with one Supreme Court of five members. The population of the state in 1920 was 2,559,123.

of other states, provisions for both special verdicts [17] and special interrogatories.[18]

The Texas name of "special issues" for this practice is distinctive, but in that state the practice is really a development of the special verdict. Such is also true of Wisconsin. The method is more like that of special interrogatories on all material issues without the requirement of a general verdict. But whatever it may be called, it reaches a similar result in each state, and doubtless it can be properly labeled a simplified form of special verdict. In each state the practice is at a different stage of development. Probably the Texas practice is most perfectly patterned, though perhaps more has been contributed to the process by the long and successful administration of a less perfected method in North Carolina and Wisconsin. A similar practice has prevailed, under some restrictions, in England for many years, and other members of the British Commonwealth have generally adopted it.[19]

[17] C. S. N. C. §§ 585–587; State v. Fenner, 166 N. C. 247, 80 S. E. 970 (1914); State v. Allen, 166 N. C. 265, 80 S. E. 1075 (1914); State v. Hanner, 143 N. C. 632, 57 S. E. 154, 24 L. R. A. (N. S.) (1907); State v. Colonial Club, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079 (1910).

[18] C. S. N. C. §§ 586, 587; Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272 (1887); Bean v. Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600 (1890).

[19] R. S. Alberta (1922), Ch. 74, Sec. 30: "Upon a trial by jury, except in an action for libel, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him, in which case the jury shall answer such questions and shall not give any verdict. Judgment may be directed to be entered on the answers to such questions." Also see Judicature Act, R. S. On-

(A) HISTORY AND PURPOSE

The purpose of the simpler practice is obviously to escape the crudeness, cumbersomeness and unfairness of the general verdict. While the North Carolina court, by rules of court, first set up the practice to "avoid delay and surprise at the trial," [20] the same court at later dates [21] has given additional purposes:

"But the trial judge should keep it in mind that the very object in submitting written issues to the jury is that they should find the facts and then the court would apply the law. * * * If it could be so, the jury ought to find the issues submitted to them without knowing whether their findings were for the plaintiff or the defendant."

"The provision in our present system of procedure for submitting issues was adopted for the purpose of enabling the jury to find the material facts with as little consideration as possible of principles of law."

In Texas, owing to the practice dating from the days of the Republic [22] of allowing jury trials in equity cases

tario (1914), Ch. 56, Sec. 61. In England the jury are not compelled to answer the question propounded, but may give a general verdict. See Wurtz, The Jameson Trial, 6 Yale L. J. 32; Mayor, etc., of Devizes v. Clark, 3 Ad. & E. 506 (K. B. 1835).

[20] 65 N. C. 705 (1871); School Committee of Providence Tp. v. Kesler, 66 N. C. 323 (1872).

[21] Elisabethton Shoe Co. v. Hughes, 122 N. C. 296, 300, 29 S. E. 339 (1898); Hatcher v. Dobbs, 133 N. C. 239, 341 (1903). See, also, Busbee v. Western North Carolina Land & Lumber Co., 151 N. C. 515, 66 S. E. 577 (1909).

[22] Section 12, Act Feb. 5, 1840, Laws of Fourth Congress, p. 88. See, also, Const. 1845, art. 4, §§ 10, 16, 18, and art. 1, § 12.

the same as in actions at law, the general charge became a very complex affair. This practice together with that of allowing specifications of error as to the charge at any time prior to the perfection of appeal or suing out of a writ of error, put trial by jury in desperate straits. The courts made an effort to make use of the special verdict but failed. Judge Gaines vigorously assailed the strict requirements of the special verdict as developed at common law [23] and suggested certain legislation that would sweep away most of the undesirable limitations upon the special verdict. His suggestions were adopted by the legislature in 1897,[24] and still later, in 1913, the remaining restrictions were swept away and the present simple method of submitting a case was perfected.[25]

In Wisconsin, as in Texas, it appears that the efforts of the courts were directed at modifying and perfecting the special verdict. Doubtless the special verdict, stripped of its common law refinements, has had its longest and most consistent development in Wisconsin. Provision for it is found in section 2858 Rev. St. 1878. Shortly after this statute was enacted the Supreme Court of Wisconsin indicated clearly its policy towards the innovation.[26]

"From our knowledge of the nature of the special ver-

[23] Silliman v. Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391 (1897).

[24] Gen. Laws 1897 (Sp. Sess.), c. 7. See also Moore v. Pierson, 100 Tex. 113, 94 S. W. 1132 (1906); Galveston, H. & S. A. Ry. Co. v. Jackson, 92 Tex. 638, 50 S. W. 1012, 51 S. W. 330 (1889), 54 S. W. 1023 (1899).

[25] See articles 2186–2189, Vernon's Ann. Civ. St. Tex. 1925.

[26] Ward v. Busack, 46 Wis. 407, 1 N. W. 107 (1879).

dicts which have come under the consideration of this court, *we believe we are justified in saying* that the tendency of some of the profession, in making use of the law which requires that a special verdict shall be rendered whenever demanded, to abuse it by demanding that the jury shall answer an infinite series of questions, the object and tendency of which is to confuse, embarrass and confound the jury, instead of eliciting the facts upon which the rights of the parties depend, needs the restraining hand of the judges presiding at the circuits, and *that this court will take pleasure in sustaining such judges in every proper effort to make a special verdict a concise statement of the real facts at issue in the case.*"

In North Carolina this process for taking a verdict is the method normally employed. In Texas and Wisconsin the method must be employed if requested by either party or if the judge so desires.[27] Consequently, it is used almost exclusively in Texas and little less so in Wisconsin.

(B) FORM OF QUESTIONS

The form the question should take has proved the hardest point of the practice. All three jurisdictions agree that the trial judge has the widest latitude in framing the issues.[28] The form is of little consequence if the material

[27] Article 2189 Vernon's Ann. Civ. St. Tex. 1925; Carter v. Haynes (Tex. Civ. App.) 269 S. W. 216 (1925); Klas v. Knehl, 159 Wis. 561, 150 N. W. 973 (1915); Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064 (1904); Rowley v. Chicago, M. & St. P. R. Co., 135 Wis. 208, 115 N. W. 865 (1908).

[28] Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367; Texas City Transp. Co. v. Winters (Tex. Com.

facts are reflected by them so that when answered they are sufficient for a judgment.[29] But in each jurisdiction it required time to develop an adequate technique for framing the issues to be submitted. At first in North Carolina, the court was inclined to approve any sort of question so long as it afforded the parties opportunity to introduce all pertinent evidence and permit it to be applied fairly. This was true even though several issues should be included in one question. The theory was that the

App.) 222 S. W. 541 (1920); Baxter v. Chicago & N. W. Ry. Co., 104 Wis. 307, 80 N. W. 644 (1899) (an excellent exposition); Rowley v. Chicago, M. & St. P. R. Co., 135 Wis. 208, 115 N. W. 865 (1908); Baumann v. C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139 (1903).

[29] Roper v. Leary, 171 N. C. 35, 87 S. E. 945 (1916); Wright v. Cotten, 140 N. C. 1, 52 S. E. 141 (1905); Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481 (1907); Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78 (1891); Texas City Transp. Co. v. Winters (Tex. Com. App.) 222 S. W. 541 (1920). A somewhat similar problem arises in framing "special issues" as in framing special interrogatories. But it is not the same problem, and considerable confusion has been caused by the assumption that the problems are the same. The "special issue" is designed to cover a single material issue of the case. A special interrogatory, on the other hand, or even a series of special interrogatories may be designed to explore into a single issue as it has been passed upon by a general verdict. A special issue should always be comprehensive enough to cover any single issue, while a special interrogatory may reach only a phase of such an issue. See Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272; Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15 (1889); Carroll v. Chicago B. & N. R. Co., 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872 (1898); Blacker v. Slown, 114 Ind. 322, 16 N. E. 621 (1888).

matter could be controlled by the charge of the judge, and that if this were done, the broadness of the question was not a defect. This was in fact very near the general verdict under a different form, and perhaps was the only modification intended by the original departure from the orthodox common law practice. Both the Texas and Wisconsin courts have condemned questions which covered more than a single issue,[30] and the North Carolina practice at this time seems to require that each issue be presented by an appropriate question.[31] This is certainly the present practice and the better practice.

Instead of a few questions covering the issues, the first attempts made by the Texas and Wisconsin courts to make use of this process went to the other extreme and questions were multiplied to cover every item of evidentiary data about which there was conflict. Some ridiculous monstrosities were perpetrated.[32] Questions which are not

[30] Article 2189, Vernon's Ann. Civ. St. Tex. 1925; Rowley v. Chicago, M. & St. P. R. Co., 135 Wis. 208, 115 N. W. 865 (1908); Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 146 Wis. 153, 131 N. W. 429 (1911).

[31] See Fowler v. Apperson, 180 N. C. 669, 104 S. E. 753 (1920); Royster Guano Co. v. Manning, 191 N. C. 422, 131 S. E. 765 (1926).

[32] Oriental Inv. Co. v. Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80 (1901); Hartford Fire Ins. Co. v. Post, 25 Tex. Civ. App. 428, 62 S. W. 140 (1900); Oaks v. West (Tex. Civ. App.) 64 S. W. 1033 (1901); Eberhardt v. Sanger, 51 Wis. 772, 8 N. W. 111 (1881); Burns v. North Chicago Rolling Mill Co., 60 Wis. 541, 19 N. W. 380 (1884); Mauch v. City of Hartford, 112 Wis. 10, 87 N. W. 816 (1901); Wolff v. Carstens, 148 Wis. 178, 134

determinative of the issues have been avoided in later years. Likewise purely formal objections as that the questions are leading (in the evidentiary sense) have been given no countenance. But the translation of issues to a jury so as to obtain well considered and intelligent answers is difficult whatever the process. The courts of these states have found no automatic method in their use of the modified special verdict. The framing of questions in simple but sufficiently comprehensive terms to cover the issues raised cannot be done off-hand.

Needless distinctions continue to be made between fact questions and those which call for conclusions of fact, as well as conclusions on so-called mixed questions of law and fact. These are holdovers from an earlier day; they have little place in modern company.[33] Issues may be very

N. W. 400 (1912); Ehrmann v. Cudahy Bros. Co., 188 Wis. 546, 206 N. W. 968 (1926).

[33] See Oregon Home Builders v. Montgomery Inv. Co., 94 Or. 349, 184 P. 487 (1919) for a typical attempt at drawing these distinctions: "If from the facts in evidence the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact to be proved as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law." This struggle for precision between law and fact and conclusion of fact, etc., is an old one. It bobs up in many places. It gives the opportunity for much quibbling and is the same sort of thing as the attempted distinction between "opinion" and "fact" in evidence and deceit. Such terms usually conceal rather than clarify what the courts are trying to say. See Clark, The Complaint in Code Pleading, 35 Yale L. J., 259, 260; Cook, Statements of Fact in Pleading under the Codes, 21 Col. L. R. 416.

simple, as the fact of death, the genuineness of a signature, age, or they may be complex, as an issue of negligence, notice, capacity to make a will, partnership, marriage. Clearly, the latter involve conclusions of law and fact. The only problem involved is to ask a question which the jury will understand. That a question involves a conclusion in view of certain legal principles applicable to them is not only inevitable, it is the end to be desired. The shorter the question the more likely will it be understood and the less likely will it be misleading. So long as it covers a single issue, the more comprehensive the term, if understandable by laymen, the better. In fact at this point there is a striking resemblance between this method of taking a verdict and the general verdict as it was originally based on the common law *single* issue. Provision is made expressly for short and comprehensive questions by requiring the trial judges to give explanation of such terms as are thought to need it.[34] There ought to be no more trouble about this matter than any other matter where the use of language is necessary, but there is and will continue to be, until appellate judges make up their minds that a law suit in the heat of battle is no place for the subtle, if not scholastic, refinements of the consultation room. A lawsuit is for the purpose of doing justice. The jury is a means—a rough and ready means—a crude piece of machinery at best—and if it is to be used rationally, these fine spun hypotheses of the legal expert will not have to be taken too seriously. It is one thing to state the law in

[34] Connellee v. Nees (Tex. Com. App.) 266 S. W. 502 (1924).

terms of exact major premises, crystal formulas, in a tediously considered formal document. It is an entirely different thing to get a determination of a state of facts, dull or dramatic, after they have been buried beneath the fancies, suspicions, irrelevancies, arguments, boring details of a court room. It would be just as intelligent to drill the delicate points of wood carving into a broad axeman as it is to instruct a jury in the nice discrimination of legal terms. The attempts of appellate judges to exact scholastic precision of trial judges on pains and penalties of reversal is humor of too delicate a turn to make us laugh, but it must be humor nevertheless. Too much meticulousness about phrasing of questions will take the life out of the modified special verdict as quickly as it will kill anything else.[35]

One of the serious difficulties in the preparation of is-

[35] In Westchester Fire Ins. Co. v. Dickey (Tex. Civ. App.) 246 S. W. 730 (1923), the court held it no error to refuse the following issue because it includes both questions of law and fact: "Did the defendant * * * agree with the plaintiff * * * that it would insure his property consisting of his stock of goods and fixtures against loss or damage by 'fire'?" But in the same case it approved this question: "Was the policy sued on herein procured by direction of Ragsdale, or his clerk, Newsome, through fraud or deceit?" In Watson v. Patrick (Tex. Civ. App.) 174 S. W. 632 (1915) the court held question: "Was defendant indebted to the plaintiff in the sum of $875 when said attachment was sued out?" to be improper as involving a mixed question of law and fact. In Devine v. United States Mortg. Co. of Scotland (Tex. Civ. App.) 48 S. W. 585 (1898) it was held that a finding that defendant was not a principal was not a conclusion of law. See, also, Mason v. Gantz (Tex. Civ. App.) 226 S. W. 435 (1920).

sues is to be found in the loose type of pleading employed. A special issue for the jury should be the same thing as an issue in the pleading so long as pleading is to be insisted upon as a chart of the case.[36] Under the suggestion, which is a sensible one, that pleading ought to be a mere introduction to trial and that the issues should be those made by the evidence, under a proper superintendence by the trial judge, the issues would not necessarily arise from the pleadings, but would be determined from the evidence. But under the systems of these states pleading is still adhered to as the touchstone of the issues to be submitted and the issues are frequently so loosely and vaguely framed that it is difficult for the trial judge to prepare the issues to be submitted definitely and comprehensively. Under the wholesale objections which are usually taken at the trial a great many of these issues will not stand up in the appellate courts. Liberality of both trial and appellate judges toward pleadings—a commendable attitude—makes this difficulty all the greater. The trial judge who overrules objections to vague pleadings, however, is not always doing either the pleader or the administration of justice a good turn. But if loose pleading is to be countenanced, the trial judge's only remedy is to recognize the heavier burden placed upon him to define the issues all the more certainly and clearly for the jury.[37]

[36] Baxter v. Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644 (1899); Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S. W. 517 (1922); Texas City Transp. Co. v. Winters (Tex. Com. App.) 222 S. W. 541 (1920). See Sunderland's suggestion, 29 Yale L. J. 262.

[37] The biggest obstacle in the way of a perfected operation of

(C) CONCLUSIVENESS OF ISSUES

In submitting cases by the method adopted by the states in question material issues are sometimes omitted; sometimes issues are submitted which are not raised by the pleadings; sometimes an undisputed material fact is submitted and found in conflict with the undisputed evidence. When is a verdict on "special issues" conclusive? Of course if the issues are found inconsistently the verdict must be set aside and a new trial granted. But not so if

the special verdict in Texas arises out of the enormous and ill-constructed machinery of the Texas judiciary. To say nothing of many minor courts, it consists of approximately 110 district judges of that many courts of general jurisdiction; about 225 judges of county courts and county courts at law, 11 courts of civil appeals with 33 judges, a supreme court of three judges aided by two commissions of appeals with three judges each, and a court of criminal appeals with three judges plus two commissioners. In the number of courts and judges it is exceeded by no common law jurisdiction, not even by the Federal Judiciary. Here is enough machinery to do the work of four or five times as many people were it properly coördinated. See Dabney: Court Organization, 5 Tex. L. Rev. 377. With the exception of the Supreme Court and Court of Criminal Appeals, the personnel of the bench frequently changes. The Supreme Court is undermanned and seldom gives attention to procedure except in promulgating broad general rules. The Courts of Civil Appeals are in frequent conflict. Under such a situation no broad procedural policies can be worked out which a large profession scattered over a large area will grasp and seek to sustain. It will be one of the most remarkable feats of common law jurisprudence if this modified form of special verdict is perfected to carry the load required of it under the difficulties of the Texas situation.

some of the issues are found in defendant's favor. Judgment will be rendered for defendant if the issues so found are material. But if a material issue is not submitted, the practice in all three states is that the party aggrieved cannot complain, unless he requested that the issue be submitted.[38] But in North Carolina the issues submitted must be sufficient to support the judgment; nothing will be presumed in its support.[39] On the other hand, in Wisconsin and Texas any issue not submitted will be assumed to have been found by the judge so as to support the judgment.[40] This is of course the widest departure from the special verdict at common law, and is one of the most important features of the practice of these states. The judge, however, may make express findings on such omitted issues.[41] In neither case is trial by jury denied, inasmuch as the failure to request the submission of the issue is taken as a waiver of jury determination.[42] If issues not raised by the pleadings are submitted without objection, the verdict thereon must be accepted and acted upon for any proper purpose; it is presumed that they were submitted by con-

[38] Maxwell v. McIver, 113 N. C. 288, 18 S. E. 320 (1893); Article 2190, Vernon's Ann. Civ. St. Tex. 1925; Gunsten v. Gordon, 160 Wis. 481, 152 N. W. 187 (1915).

[39] Tucker v. Satterthwaite, 120 N. C. 118, 27 S. E. 45 (1897).

[40] Article 2190, Vernon's Ann. Civ. St. Tex. 1925; St. Wis. 1929, § 270.28.

[41] Ward v. Etier, 113 Tex. 83, 251 S. W. 1028 (1923).

[42] Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N. W. 1079, Ann. Cas. 1916E, 460 (1914); Bratz v. Stark, 138 Wis. 599, 120 N. W. 396 (1909); Bates v. Chicago, M. & St. P. R. Co., 140 Wis. 235, 122 N. W. 745, 133 Am. St. Rep. 1069 (1909).

sent of the parties.[43] If there is an undisputed material fact which is inconsistent with some finding in the verdict, such undisputed fact must be taken into consideration in rendering judgment. It has the same effect as if formally incorporated into the verdict. The result is the same as if the verdicts were inconsistent on two material issues actually found.[44] If an undisputed material fact is submitted and found against the evidence, under Texas practice the trial court can not render a judgment non obstante veredicto, though the Court of Civil Appeals could do so.[45] In all three states the complaining party must have excepted to any error the court made in submitting the issues, and must have requested any omitted issue to have been submitted. In absence of such action on his part the jury's verdict is generally conclusive.

(D) GENERAL INSTRUCTIONS

General instructions by the judge as to the law to be applied by the jury in returning a general verdict have normally been given. In the case of a special verdict as at common law there is no place for such instructions.[46] In the modified form of special verdict now under discussion there is no place for instructions of any sort as

[43] Porter v. Western N. C. R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272 (1887).

[44] Murphey v. Weil, 89 Wis. 146, 61 N. W. 315 (1894).

[45] See 3 Tex. L. Rev. 450; Henne & Meyer v. Moultrie, 97 Tex. 216, 77 S. W. 607 (1903); Massie v. Hutcheson (Tex. Com. App.) 270 S. W. 544 (1925).

[46] See Clementson: Special Verdict, Ch. VI (1903).

to the law unless it be to indicate to the jury that they are the judges of the credibility of the witnesses, possibly to indicate the burden of proof in rare instances, and to explain the meaning of any technical term which the judge finds it necessary or desirable to use in framing the issues. This is the Texas practice.[47] But in North Carolina it is remarkable to find the general charge in all its fullness and complexity of technique flourishing alongside the simple and rational process employed for submitting a case to a jury. The judge still prepares and delivers to the jury a ponderous list of instructions along with the questions submitted.[48] Counsel must still be on guard lest the judge should misstate the law. The case is still subject to reversal if the judge errs in stating the law on a material point, or if his statement of the evidence may be construed as a comment on the weight of the evidence. All of the pitfalls of the general charge are still open, and all the confusion which a rapid fire lecture on intricate legal rules can create in a layman's mind is still possible. Of course, this is wholly antagonistic to the idea embraced in submitting issues of fact instead of requiring a general verdict. One of the purposes of the simple process is to get away from the necessity of the jury's considering the law at all. If the issues are properly framed there is no

[47] Owens v. Navarro County Levees Imp. Dist., No. 8, 115 Tex. 263, 280 S. W. 532 (1926); Wichita Falls, Ranger & Fort Worth R. Co. v. Combs (Tex. Com. App.) 268 S. W. 447 (1925); Kuehn v. Kuehn (Tex. Civ. App.) 259 S. W. 290 (1924).

[48] See Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482 (1897); C. S. N. C. § 564.

need of instructions on the law. And to the extent that the North Carolina process involves the giving of instructions as required with a general verdict it is imperfect, and must continue to be so long as this anachronistic practice is continued. Not one thing can be said in favor of the use of the general charge in this fashion; it can only destroy in part the good effect of using this form of the special verdict.

Even more surprising is the fact that Wisconsin also adheres to a general charge along with a practice which goes under the name of a special verdict.[49] This contradictory combination has given the courts much trouble and has been condemned time and time again by the Supreme Court. It is called a "bad practice" [50] and the Supreme Court has finally limited such instructions to the "general rules of law appropriate to the particular question of the special verdict." [51] It is clear that this is not a solution of the "bad practice;" it is merely a bad compromise. It is half way ground between the practice of the other two states under discussion. There is no place for any instructions save as indicated above. The numerous cases reversed on the grounds of erroneous, misleading and confusing charges indicate how seriously this practice interferes with a proper administration of the law. And from a cursory examination of Wisconsin cases dur-

[49] See Rump v. Bresnan, 160 Wis. 179, 151 N. W. 251 (1915).

[50] Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26 (1901).

[51] Banderob v. Wisconsin Cent. R. Co., 133 Wis. 249, 113 N. W. 738 (1907).

ing recent years it would seem that there is a tendency to leave off, more and more, these hurtful appendages, and doubtless experience is dictating the wisdom of such a course. The same tendency may be expected in North Carolina.

(E) TEXAS PRACTICE SUMMARIZED

As the Texas practice is perhaps the best formulated it may be well to summarize it briefly as indicating the simplicity of the process.

Special issues requiring a special verdict on the material disputed facts raised by the pleadings and evidence are mandatory, upon the request of either party, or at the discretion of the trial judge, in all cases in which the nature of the suit will permit.[52] The case has not yet arisen in which the nature of the suit makes it impossible to employ such issues and never should arise, inasmuch as they must always be easier to frame than a general charge covering the same issues.[53] It is error to employ both methods in the same case.[54] Failure to submit an issue shall not be deemed ground for reversal unless its submission was requested in writing by the party complaining of the judgment.[55] An issue not submitted and not

[52] Rev. St. Tex. 1911, art. 1984a, as added by Acts 33d Leg. (1913) c. 59, § 1, article 2189, Vernon's Ann. Civ. St. Tex. 1925; Carter v. Haynes (Tex. Civ. App.) 269 S. W. 216 (1925).

[53] J. M. Guffey Petroleum Co. v. Dinwiddie (Tex. Civ. App.) 168 S. W. 439 (1925).

[54] Stark v. Slack (Tex. Civ. App.) 234 S. W. 687 (1921).

[55] Article 2190, Vernon's Ann. Civ. St. Tex. 1925.

requested is deemed as found by the judge in such manner as to support the judgment if there is any evidence to sustain such a finding.[56] But the trial judge may make additional finding of fact on issues not submitted to the jury, and which in no way conflict with the findings of the jury.[57] No instruction shall be given in connection with special issues other than to advise the jury as to their power to pass on the credibility of the witnesses, weigh the evidence, in some cases to indicate the burden of proof[58] and to define and explain such terms to the jury as they may not be able to understand.[59] While special instructions may be asked by counsel, they must be prepared and presented timely and not go beyond those that the court can give in its main charge. The dangers a trial judge ran under the general charge and general verdict method in passing on numberless special instructions prepared by counsel skilled in highly specialized types of cases is almost totally eliminated. Generally, all objections made to issues or affirmatively erroneous instructions are required to be made before the charge is given the jury: and as to all errors of omission the objecting party must present and request a substantially correct issue or charge —one at least sufficient to call the court's attention to the point.[60]

[56] Id.

[57] Ward v. Etier, 113 Tex. 83, 251 S. W. 1028 (1923).

[58] Kuehn v. Kuehn, 259 S. W. 290 (Tex. Civ. App. 1924).

[59] W. F. & Ft. W. Ry. Co. v. Combs, 268 S. W. 447 (Com. App. 1925).

[60] Id.

CONCLUSION

It ought to be clear that such a simplified procedure is not an attack upon trial by jury, but is merely a further perfection of that process. It is a simple and easily administered substitute for the general verdict, general charge, special verdict as at common law, and special interrogatories under the statutes. All of these and most of the law which has grown up about them can be forgotten. The method eliminates from procedure many of the difficulties, and all the mystery, involved in the use of a jury. There is much that can be said both for and against the jury system as a means of administering law. There is no likelihood that it will be superseded on any wide scale at any early date by any better agency. But the vice of the jury system is not so much that it is a jury, but in the way it is used. We have been demanding too much of it. With a modified form of special verdict, together with power in the trial judge adequately to supervise the selecting of a jury, and a general restoration of the common law power of advising the jury on the facts—of extreme value in extreme cases—little else would be needed to reach the high water mark of jury trial.[61] Whether there is any place at all in a modern system of procedure for a crude and costly piece of machinery like the jury is a much larger question.

[61] See John W. Staton, The Special Verdict as an Aid to The Jury in Civil Cases, 34 Md. State Bar Ass'n Rep. 4 (1929); Robert T. Donley, Trial by Jury in Civil Cases, 34 W. Va. Law Quarterly 347 (1928).

CHAPTER 14

JURY TRIAL AND THE APPELLATE COURTS[1]

The adjustment of the difficulties of everyday life through the dual agency of expert and lay citizen—judge and jury—is the dominant idea of Anglo-American courthouse government. The whole of our procedure is built about it. The difficulties of evidence, instructions, new trials, appellate review, and the abuses which arise from crowded dockets, excessive costs, unethical practices, and most of the other troublesome incidents of the judicial process result primarily from jury trial. Whether we employ it in all cases or not, it sets the pattern for all other procedure and ultimately colors any movement for procedure simplification. While I speak primarily with reference to civil cases, much of what I shall say has application to criminal cases also. The remarkable thing about jury trial is not that we insist upon it or that we have made it a fetish, but rather the lengths to which we go, *first*, to render it innocuous, and *second*, to make of it a mere shock absorber for the judges.

Since jury trial was first set up, the judges have found their most difficult problem in subjecting it to control. But despite that fact, the strongest supporters of jury trial are not everyday citizens, nor lawyers, nor legisla-

[1] An address delivered to the Illinois State Bar Association at Bloomington, May 29, 1930.

tors, but the judges themselves. The extreme solicitude for jury trial on the part of judges points unerringly to its greatest function in our government—that of an absorber of the discontent of citizens whose everyday affairs are subjected to the control of courts. In this it serves a prime political function in democratic government. What discontent, however inflamed, can be long sustained against a jury which, with its verdict given, dissolves into citizenship at large? To be effective, discontent must have a victim. Doubtless the absorptive qualities of a jury's verdict have saved many a judge from the sacrificial altar of an excited populace. And possibly that function alone is enough to warrant its retention even at this stage of democracy's maturity. At any rate, it is still serving such a purpose to good advantage in cases involving some of our recent legislation. The jury, as we know it, has always done its best service as a political shock absorber in the administration of law; first, against the bungling jolts of a disordered and partisan administration itself; second, against the ruts of prejudice and obstructions of violence on the part of an inflamed group or disorganized community. But in order to preserve the jury for this function, it has been necessary to develop immunity against its powers in other directions. A study of the long struggle to subject it to control indicates how completely this has been done.

The early jury served as a check upon severe and corrupt practices of the king's judges, as well as a stabilizer of a more rational administration of law at a time when law administration was just emerging from superstitious

and barbarous methods. But laymen themselves displayed decided weaknesses in their judgments. The withholding of food and drink until verdict was rendered was an early expedient against their stubbornness. The cruel and clumsy method of attaint was inaugurated as a means to punish juries who rendered false verdicts. In turn, the special verdict was designed to give the jury relief from the harshness of attaint. But after it had served its day as an escape for the jury, the special verdict was seized upon by the judges as a means to reduce the sweeping power exercised by the jury under the general verdict. The attempt to compel juries to render special verdicts having proved ineffectual, the judges, under the power to commit for contempt, sought to jail the stubborn juries which would not obey the judges' instructions. These methods, if they were to be successful, probably disclosed too clearly the ultimate impotency of jury trial, and they were thus cut short by stout resistance. The less harsh devices of granting a new trial and of scaling verdicts, of sustaining demurrers to the evidence as finally developed, and more lately of directing verdicts, granting nonsuits and giving judgments notwithstanding the verdict, proved far more effective in restricting the jury's power to a subordinate place in the dual relation and were less subject to effective opposition. The most successful devices employed, however, and particularly by the later common law English judges, were *first*, the utilization of demurrers and pleadings for narrowing the questions to a point where the judge himself could decide the case without jury participation, or at least reduce such participa-

tion to a minimum (the special traverse and express color are good examples of this practice); *second,* the greater extension of and emphasis upon the distinction between questions of law and questions of fact, together with unrelenting insistence on the part of judges that juries must accept the instructions upon the law as the judges pronounced it; and *finally,* the great freedom the judges took in advising juries as to the weight to be given to the facts themselves. With this array of methods, after much shifting first in one direction and then in another, the English common law judges by the early 1800's found no great difficulty in subjecting the jury to their control; and with the development of a simplified special verdict, the requirement that jury trial be affirmatively claimed by the parties, and the recent power given reviewing courts to draw all necessary inferences of fact and hear new evidence if necessary, jury trial has ceased to be a problem in English administration of law.

The trial courts in America for most part have never exercised the full power of English common law judges. Moreover, their power has tended constantly to decline. Under the influence of the democratic ideas of the late 1700's and early 1800's in general, and subsequent legislation in particular, the sweeping general verdict has continued to be the normal verdict. The attempt originating in the New England states to employ special interrogatories in aid of general verdicts has proved abortive when attempted to be used by the country at large. The modified form of special verdict evolved by the English judges and now so common in England is known in only two or three

of our states, and that only lately and in very imperfect form. (I might say parenthetically that this form of verdict is probably the most satisfactory that has yet been developed. Due perhaps to it more than any other one procedural factor, twenty-four trial and appellate judges do all the serious court business of North Carolina's three million people. There is nothing in our own country to compare with this record of judicial efficiency.) The spirit of pleading in most states became the reverse of that which required a narrowing of the controversy to well-defined issues. Numerous questions of law have been given over intact to juries, while others were either turned into questions of fact or mixed questions of law and fact. The trial judges' power to deal decisively with questions of evidence has constantly dwindled. In most states the judge has been effectually prohibited from instructing the jury save in abstract principles or rules of law, and in some instances only then at the request of counsel. Trial courts have become more and more timid in instructing verdicts, while the demurrer to evidence has practically vanished, and the power to grant judgments notwithstanding the verdict severely limited. Even the granting of new trials, and particularly on the basis of the trial court's discretion—the severest curb that trial judges retained for controlling jury verdicts—was restricted through early legislation in nearly every state, while the power to scale verdicts or to restrict the new trial to a single issue, though frequently granted to appellate courts, was for a long time generally denied to trial courts. With few exceptions, practically every change in trial procedure in America dur-

ing the nineteenth century meant more and more domination by the jury and less and less control by the trial judge; and in so far as trial courts in most states are concerned it probably is still true that juries exercise a dominant power in those cases in which they participate except in so far as trial judges exercise power by the grace of appellate courts. The contrast between state and federal courts in dealing with juries is so marked that attempts are constantly being made to reduce the trial judges of our federal courts to the same low state as the trial judges of our state courts, and this although federal trial judges themselves are by no means as unrestricted as were English common law judges.

Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system. The early appellate court, made up as it was of a group of trial judges, neither had nor sought a dominant position in the judicial system. From the moment that the appellate courts became a separate organization from trial courts, a silent and probably unconscious struggle for supremacy began, which has resulted not only in complete subordination of trial judges but also of juries. It was a development made necessary by the unhealthy ascendancy that the jury had obtained over the trial judges. It may be regretted that this dominance of the appellate courts has carried along with it the too great overshadowing of the trial judge, but inasmuch as he was already a cap-

tive, his further loss of power has not made a great deal of difference. At least he now may be, and often is, through the grace of an appellate court, allowed the freest hand he has ever known in this country, but not through any extensive power he may call his own. This does not mean that a trial judge of great capacity will not be accorded the greatest leeway in the direction of his court, but it does mean that his actions may be supervised at every step.

The development of the complete control of both jury and non-jury trial by appellate courts cannot be told here in detail. It can be sketched in part and indicated generally in other parts. It has not been the result of legislation nor constitution making. On the other hand, it has in no small part been in opposition to the spirit of both; it is the result of the well recognized phenomenon of the common law judicial power to expand with its exercise. Appellate courts were given the final power of passing judgment, and power attracts to itself responsibilities. That fact is enough to account for the result. But it is the mechanisms through which that power is exercised that hold the interest of the student of government through courts.

Inasmuch as appellate courts are located at such great distance behind the lines, a most elaborate scheme of things is required in order for them to exercise their power effectually. If they are to review each step of a case with intelligent appreciation, then they must have devices which lay open those steps and make it possible to give effect to their own judgments. And a more plentiful sup-

ply of intellectual machinery has probably never been mobilized in any other field or any other science. Whatever machinery may have been devised for use of the trial court has been taken over and turned to the purposes of appellate courts. In them is the center of power; in that center the administration of law must focus. This machinery is made up of a network of theories, doctrines, formulas and rules of the utmost flexibility in the hands of judges who understand their uses. These theories, doctrines, formulas and rules are in turn of such importance that they are known as the "law of the land," to the complete overshadowing of the power of judgment itself, which is operative and articulated through them.

Probably none of us appreciates the tremendous bulk of these intellectual devices which we call law. Nor do we appreciate the short time which it has taken to develop them, or the tremendous rate at which they are being expanded and refined. The great bulk of them have been brought into existence within the past century. Certain it is that their multiplication and expansion are coincident with the rise and development of reviewing courts.

The basic doctrine on which the structure of appellate court power is founded is, of course, the doctrine of *stare decisis*, which was first utilized in developing uniformity in writs and other procedural devices, but which was not fully formulated as to the abstract principles of so-called substantive law until the late 1800's, just as appellate courts had reached their maturity. What this doctrine is or when it can be decisively invoked is a matter of no moment. It is essentially an administrative device as its

origin indicates, the basic instrumentality necessary for appellate court domination through doctrinal administration, and, once granted, appellate courts were enabled to bring under their administration the total judicial power of their geographical boundaries. That appellate courts themselves should adhere to the basic doctrine of *stare decisis* is only a matter of their own concern; they may give it in their own judgments such weight as they desire; that they do adhere to it for most part only means that the necessities of administration require that such be done. The point of significance is that under this doctrine they determine the scope of activities and range of judgments both of trial judge and jury, as well as intermediate courts.

Through the doctrine of *stare decisis* every single phase of trial has been effectually controlled, and the rules which govern trial courts have been expanded and crystallized. The only instance in which expansion has not taken place is probably the subject of pleading, and pleadings after all were designed for furthering the power of trial courts. But the rules of jurisdiction, the matter of jury organization, the rules of evidence, instructions to juries, the conduct of counsel, trial judge and jury, the verdicts of juries and the findings of judges, the entries of judgment, motions for new trial, perfection of appeal and record on appeal, briefs, and all other matters incident to litigation, have developed in such bulk and refinements that no lawyer would boast of having a mastery of them as found in a single jurisdiction. At every step of the elongated process of trial, it has been necessary to crystallize the practice into more or less standardized rules, primarily for the pur-

poses of administration by an appellate court, which if to act intelligently and if to maintain its ascendancy must know what has taken place upon the trial and be able to approve or disapprove. What has taken place here is nothing more than the methods and practices required by any organization, whether judicial or otherwise. It is only through organization that power so far removed from the scene of action can be made effective, but in order that appellate courts in reviewing the details of trial shall not be bound to hew to the line of such requirements, they must have and are accorded the leeway of an ameliorating doctrine known as "harmless error," by which they can equalize the divergencies in the operations of the numerous courts under superintendence. And more than this, in order to *perfect* the numerous processes of trial procedure, appellate courts must have the further power of making improvements here and there as they become desirable, and this we find in the rule-making provision now so widely advocated as a necessary adjunct to the exercise of judicial power.

As means of controlling the results of trials these devices look formidable enough, but they are in fact of minor importance—they are the devices we think of as procedural and as more or less mechanical. They are the means by which the processes themselves are kept in line. But the larger powers which go to what we may call the merits of judgment are normally exercised through far more subtle theories and formulas. These theories and formulas are found in every field into which we have classified the realm of law—in contracts, in torts, in prop-

erty, in criminal law, in constitutional law, in equity, in sales, in corporate organization, in trusts, in wills, and a score of other major subject-matters. It is these which for lack of a better name we look upon as substantive law, and through which appellate judges control the judgments below, whether of trial judges or juries. And it must be remembered in this connection that American appellate courts have always refused to invade the jury's province of passing on the facts. Probably what is meant here is the credibility of witnesses. But whatever the function may be, and even when sought to be imposed by the legislature, appellate courts have refused to take it over on the ground that to do so violated the constitutional guarantee of trial by jury.[2]

But the refusal to accept additional power at this point must not be taken too seriously. The courts did not need it; they had already developed all the machinery necessary for jury control without undertaking the laborious work of fact weighing, and to have taken over this responsibility would not only have added to their burdens and have crushed the jury at a point where the judges desired to utilize it, but would also have destroyed the jury's usefulness as an absorber of public criticism, as already pointed out.

It would be impossible to indicate in any large number

[2] The exercise of such a power by the Illinois Appellate Court for a period of thirty years was not enough to overcome this argument when the question was presented to the Illinois Supreme Court. Only recently in California the duty has been imposed by Constitution.

of these fields the numerous theories, formulas and rules which are employed by the judicial process through which appellate courts make their judgments effective. But for the purpose of supporting somewhat the suggestion which I make, I dare take your time to look in upon one small segment of the field of torts—the segment which we know as "negligence."

Probably there is no class of cases which demands so much jury participation as those we label "negligence." After a study of several thousand of such cases, I think I can say that there is no other group for which the courts have developed so many subtle doctrines for effectually controlling jury judgment and reaching results that the appellate courts themselves approve. In the first place, the judges take unto themselves, and rightfully so, the function of declaring rights and duties—in other words, indicating the boundaries of legal rules, or the harms against which government will undertake to give protection of some sort. Legal theory is found in abundance at this point. I need but enumerate some of the more important ones as found in negligence cases: The doctrines of trespass, licensee, invitee, affirmative conduct, fault, act of God, assumed risk, contributory negligence, gross negligence, discovered peril, last clear chance, independent contractor, non-delegable duties, dangerous instrumentalities, scope of employment, joint enterprise, nuisance, proximate cause, and others. There is no case that does not afford a court the opportunity to employ one or more such doctrines in some one or more of their variations. Mere-

ly as an illustration of the possibilities at this point I give two or three recent simple cases.

The Illinois court having before it a case in which on account of the failure of the defendant, in installing a heating system, to fasten securely a cleat supporting a cold air shaft in the floor, through which plaintiff had fallen, was met by the "independent contractor" doctrine. That doctrine had saved many a defendant from responsibility. But not so here. The court had no difficulty in calling the air shaft a "dangerous instrumentality" and thereby effectually obviated the obstacle to plaintiff's recovery.[3]

The New York Court of Appeals was presented with a case in which plaintiff had sued for a hurt received from a defective sidewalk. She based her claim on the theory of nuisance. Defendant had sought to interpose plaintiff's contributory negligence, but was met by the logical answer that contributory negligence was not an appropriate defense to nuisance. The New York Court of Appeals, impressed by the defense, set about to give it recognition. Through the refreshing skill possessed by its chief judge for dealing with legal theories, the court developed the idea that this was a "negligent nuisance," hence contributory negligence could be employed as a defense, and the judgment for the plaintiff should be reversed for a new trial.[4]

The Ohio court worked the "reverse English" on a similar situation. Having a case in which a city was being

[3] Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N. E. 162, 60 A. L. R. 353 (1928).

[4] McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928).

sued for leaving a safety island improperly lighted while under construction, the defendant interposed the well-recognized doctrine that a city is not to be held for negligence while performing a governmental function. In Ohio the maintenance of streets is a governmental function. The Ohio court, invoking a statute of some seventy-five years standing, which declared that municipal corporations must keep their streets open, in repair, and free from nuisance, held the improperly lighted safety island a nuisance. The defense of governmental immunity having no place against a nuisance, a way was opened by which plaintiff could recover.[5]

The English court was presented a case in which defendant, in doing repair work on a building owned by X, left some rubbish on the roof. X subsequently let the building to plaintiff. During a rain the rubbish choked the drain pipe and produced an overflow which spoiled some of the plaintiff's goods. Plaintiff sought to maintain the action on the basis of defendant's negligence, but the court could find no duty to plaintiff, inasmuch as he became a tenant after the debris was left on the building. But the court very ingeniously discovered that leaving the rubbish on the roof was a continuing trespass although it was not a trespass at all when put there. Through its power to draw inferences, the court sustained a recovery for plaintiff.[6]

In these and many others like them, jury verdicts may

[5] City of Hamilton v. Dilley, 120 Ohio St. 127, 165 N. E. 713 (1929).

[6] Konsier v. Goodman (1928) 1 K. B. 421.

be immaterial, or on the other hand, what look to be perfect defenses may be swept aside. Under their power to define and give scope to duties, appellate judges can and do frequently decisively dispose of such cases. The opportunities for so doing which the wealth of legal theories affords in such cases are simply unlimited. No astute judge need want for a perfectly well accepted way to articulate any decision at this point that his judgment may dictate. We think of these doctrines as substantive law. *In fact, they are but intellectual instrumentalities in the higher realms of court administration, through which judges exercise their power of judgment.*

These mark, however, but a first step. Assuming that the court is inclined to find that defendant was under a duty, the plaintiff must still make an issue as to its violation. The proof must present a situation as to which the court can find there is room for at least two reasonable inferences or that reasonable minds might disagree as to the inferences to be drawn. The cases are not so infrequent as to be unusual, where, after verdict and judgment in the trial court and affirmance by an intermediate appellate court, a supreme court has held by division of opinion that there was no room for two reasonable inferences or that reasonable minds could not disagree about the matter. And, having so said, the case is ended. The power of final judgment must rest somewhere, even though it result in a decision by three or four men that the inferences drawn by fifteen others or more was not reasonable. This point is illustrated in a recent Illinois case in which plaintiff sought

to recover against a railroad company for injuries received under rather peculiar conditions. Defendant's engine while passing under a bridge sent up such a volume of smoke that plaintiff stopped her car. Another car coming from behind, and also blinded by the smoke, bumped into plaintiff's car. She got out and went behind the car to see what damage had been done. A third car coming from behind, and also blinded by the smoke, bumped into the second car and caught plaintiff between the second car and her own. The Supreme Court reversed a judgment in her favor, which had been affirmed by the appellate court, on the ground that she had not offered sufficient evidence to sustain the burden that she was in the exercise of care for her own safety.[7]

Of further importance is the control exerted over verdicts through the strict standardization of formulas which the trial judges may employ in instructing juries in particular cases. These formulas are numerous and different ones are designed for different types of situations. You are familiar with many of them, and also the penalties that flow from a trial judge's employment of an unacceptable formula. In negligence cases there are many of these: "The ordinarily prudent person under the same or similar circumstances," "the highest practicable degree of care," "wilful and wanton negligence," "prima facie negligence," "res ipsa loquitur," "inherently dangerous instrumentalities," and numerous variations of each, supported by many

[7] Illinois Cent. R. Co. v. Oswald, 338 Ill. 270, 170 N. E. 247 (1930).

judicial makeweights known as the burden of proof, and presumptions. And finally, when a case is a very troublesome one, and the appellate court is not satisfied with its disposition below, a last line of defense has frequently been found in the redoubts of proximate cause to which a court may always retire in safety, either for the purpose of covering its own judgment or to rip up that of a jury.

The fact that these theories are at hand does not mean that appellate courts do in fact rip up every jury's verdict which comes before them on review. Quite the contrary is true. As a rule appellate courts have great respect for the findings of juries. Let me emphasize the fact, lest I be misunderstood, that I am not making the point that appellate courts misuse their power in these or other cases. What I do mean is that, if they should see fit to do so, appellate courts not only have the power but have at hand the most generous supply of intellectual machinery for controlling the determination of these cases. What is true in negligence cases is equally true in other large fields of tort litigation, as deceit, libel and slander, assault and battery, and all the other cases in which juries normally participate. *In brief, the extravagant pains we take to preserve the integrity of jury trial in final analysis are completely counteracted in the more extravagant provisions which we make for appellate review, together with the remarkable technique appellate courts have developed for subjecting every phase of trial to their own scrutiny and judgment.* This is equally true of non-jury trials. In the simple cases, which are in the majority, trial judgments are

allowed to stand, doubtless because they meet the approval of courts; but in doubtful cases they stand, *if at all*, because the court has no better solution to offer, and the jury can better absorb the shock that comes from a doubtful decision than can the judge.

You are doubtless curious to hear the moral of this brief exposition of the power and practices of appellate courts. Is it a plea for the re-establishment of jury trial domination? Not at all. The crudities of jury domination, let us hope, have passed forever. Is it an attack upon appellate courts? I hope no one will so construe it. Appellate courts have retrieved the power that democratic government must place in its judicial officers. That result is enough to offset every criticism that can be made against them, and more. To all practical purposes they have reached the same point of control over the jury as have the English judges. They have merely been forced to reach this objective by more roundabout methods. All that remains now to be done is to recognize the point we have reached, and to clear away the expensive and time-consuming processes which have served their day, so that the power of judges can be exercised more directly.

By turning thought to the extravagance in process and intellectual machinery which it has been necessary for our judicial organism to develop in order to survive, it is hoped that we may more clearly see our present task. The making of law administration either prompt or inexpensive must prove futile until the mass of procedural machinery which has been necessary in order to win the fight for ju-

dicial supremacy as opposed to lay supremacy in the matter of courthouse government has been replaced by machinery of a simpler pattern. No short and inexpensive method of employing the present extravagant set-up of procedural and intellectual machinery can be developed. Personally I feel that the general lethargy of a great many of our ablest lawyers in their support of what we may call judicial reform is and has been due to the feeling that the attempts which have been made have largely involved mere details, while the problem demands a thoroughgoing study of the entire judicial organization, to the end that it may be realigned on more workable lines. Certain it is that we cannot go along very far with all the responsibility for efficient administration focused upon trial courts while all the power is held by appellate courts. Such a division of responsibility and power never has worked in any business; we need not expect it to work here. The two must be brought together. It may be that prompt and inexpensive judicial administration lies in the re-establishment of a system of courts in which the large powers now exercised by appellate courts shall be restored to trial judges. Instead of mobilizing our forces so far back of the line, they might just as well be brought to bear on the line itself. Instead of attempting to control the disposition of cases exposed through bulky records and through theories and formulas of doubtful validity and little integrity of their own, such control could doubtless be better exercised from the trial bench. Instead of a more or less preliminary trial and a serious appeal, there should probably be a more

serious trial and an informal checking up of the trial court's work, something as is done in England to-day, or as was done both in England and in this country at one time on the hearing of the motion for a new trial before the court in banc. Instead of seeking to point out errors through the cumbersome process of appellate procedure and eradicate them through new trials or doctrinal subterfuges, they should be prevented by utilizing the great bulk of our judicial intelligence on the trial of cases in the first instance. In short, by the organization of a single court including all judges under flexible administrative supervision, in which would be vested the complete judicial power as now found in our appellate courts, the business of handling litigation might be left to the court, primarily upon the trial in the first instance, with such quick and mobile superintendence by way of review as good business of any sort demands. By such means we should hope to meet the desire for prompt and effective law administration. And that having been done, we should be content to absorb the injustices which sometimes occur under the most perfect organization, by placing them in the profit and loss column of the business of government, for government at best can never achieve more than an approximation of that thing we call justice.

CHAPTER 15

WHY TRIAL BY JURY?[1]

In early England, and in the pioneer days of our own country, the sheriff, as the chief officer of the shire or county, could be depended upon to summon twelve or more good men and true for jury duty without any undue embarrassment of justice. But the political possibilities of his office were too great. He aligned himself offensively and defensively with influential lawyers and all character of other interests, so that it required generations of reform to separate him from the power to dispense favors and protection to, as well as take vengeance upon, juror, litigant and lawyer alike.

In his stead have been set up jury commissioners, jury wheels, and many other schemes for cataloguing, drawing and checking jurymen, some of them extravagant in their detail. But still the results are no better. In New York the statutory provisions on the subject take up 236 sections of the Judiciary Law. Panels of from twenty-four to forty-eight prospective jurors, and in important cases or where there are several courts, many times that number are provided for each week of the jury calendar. And once a panel is presented in a particular case, the process of selection has barely begun. First, the judge will excuse those who have legal exemptions (and these are

[1] This article was first printed in The American Mercury, vol. XV 316 (1928).

many) and also those having good excuses, even though not exempt under the statute. Inasmuch as lawyers are sometimes consulted as to what is a good excuse, some of our intelligent peers come well prepared to be excused.

But the chief effort at elimination comes on the part of counsel in seeking to disqualify members of the panel for cause and to discover ground for exercising peremptory challenges. The examination by counsel takes a wide range; the possible grounds for challenge are innumerable. A bias or prejudice against a rich litigant, or a corporation, or a public utility, or in favor of a poor man, or a certain class, or against capital punishment, or against damage suits, or a definite opinion about the merits of the case gained through the newspapers or by personal contact with the witnesses, or by kinship, or by employment, or (in some jurisdictions) anything that may be "reasonably calculated" to make the juror less than "white as paper," a "perfect perpendicular," or a "judicial blank," will disqualify him. Here, again the intelligent juror caught on the panel discovers quickly how to disqualify himself. Having eliminated as many as possible of the undesirables for cause, the parties each have from three to thirty-five peremptory challenges, depending upon the jurisdiction and class of case, which they can and usually do use, for good reason or no reason at all, to get rid of those not desired who have not been eliminated otherwise.

Here we have a slaughterhouse of the few remaining peers on the panel. Whatever may be the law's ideal, the parties are not seeking impartial citizens; they are interested in obtaining favorable jurors. The time squandered

in this preliminary may run from an hour to a week or more—time enough, in many instances, to try the case. The selection of a jury within three hours by Justice Bailey under the new Federal Court rules for the second Sinclair trial is the most remarkable instance of dispatch known in modern American jury trials. But even this small detail of procedure will require probably fifty years and hundreds of decisions before it will become a part of trial by jury generally in this country.

Assume that the machinery of justice is now set up for the particular case. The next case, of course, must provide its own jury; each party has his own set of peers. But to the merits! The parties are nervous, the judge is impatient, the witnesses are jumpy, the members of the jury are eager to be about their business. Counsel are not so impatient. They know who must do the chief acting in this drama, and the time required in order to act to advantage. In the examination of the jury they have introduced themselves. Whether serious and dignified, smiling and friendly, blustering and bullying, suave and clever, blunt and brutal, or quiet and cautious, they have chosen their rôles. They are now ready to make their second appearance in the opening statement to the jury.

The opening statement is for the purpose of preparing the jury for what is to follow by way of proof. It is an outline of the theory of the case from the opener's standpoint, together with a statement of what he expects to prove and how. It offers no mean opportunities to a skilled trial lawyer. There is no argument so telling as artistic statement, and here the plaintiff's counsel has the

advantage of talking to the jurymen while they are still eager and fresh. The lawyer who knows his jury neither overdraws nor blurs this first picture, and its lines are ineradicable. The opening statement gives the plaintiff his first great chance to tell his story. He will have few others so dependably favorable. But when the plaintiff is through, the jury is whetted to hear what the defendant can say, and his story must be even more greatly told if he is to overcome the advantage of his opponent.

Let it be noted that the whole scheme of trial by jury is designed to produce effects tellingly. The prelude in selecting the jurymen affords an opportunity to build up their expectancies, and arouse their emotions to a pitch where they can picture themselves chosen to play a most important part in a most serious business, and that under the public gaze. The longer the trial lasts, the larger the scanning crowds, the more dramatic the witnesses, the more intensely counsel draw the lines of conflict, the more solemn the judge, the harder it becomes for these triers of the facts to restrain their reason from somersaulting. Little wonder the juries so often become avengers in behalf of an outraged plaintiff or persecuted defendant! The doers of justice are made as keen as the bull for his fight. This was well illustrated in a recent New Mexico case, in which the plaintiff sought to recover damages for money taken from him by force. The jury returned this verdict: "We, the jury, find for the plaintiff in the sum of ten thousand five hundred dollars, less one hundred and ten dollars, and sentence each of the defendants to five

years in the penitentiary, and recommend the mercy of the court!"

Each witness, feeling the importance of his part, is eager that his testimony be of the greatest value to his side and of the utmost hurt to the opponent. The litigants, knowing that they are down for leading rôles, dress for the occasion, and bring their retinues of relatives and neighbors, whom counsel must both encourage and censor. Even the audience enters into the spirit of the play, taking sides and applauding one way or the other. The court attendants do no less. The judge unconsciously exaggerates his conduct. Of all these, counsel alone, if skillful they are, know that the rest are mere stage dressing for themselves, one of whom must be the villain and one the hero, but which, neither is yet certain. The play depends upon their finesse and artistry. In other words, it is the lawyer who makes trial by jury dramatic, and trial by jury was designed and perfected through the centuries, perhaps unconsciously, to make a stage for him, its chief actor. The institution is the lawyer's most artistic handiwork; the courthouse is still his playhouse.

The offering of evidence gives fine advantage to all parties in the play. The lawyer offering the witness assumes the attitude calculated to put him in the best light; the opposing lawyer objects and storms, or what not, as seems best suited to put the witness in the worst light. The judge takes whatever attitude toward the witness and the objections seems best designed from his standpoint to impress the jury and the audience with his impartiality —unless he desires to play a more important part than

that of mere moderator. The jury leans forward; the crowd is quiet, and cranes and waits. The witness and the lawyer show whatever skill they possess. They may or may not score; but that is their immediate objective. Whether they do or not, when the tenseness is over the litigants come back into the picture; for the moment they have been forgotten. And thus it goes on until the last witness is excused.

The rules of evidence which have come to govern the hearing of a witness's story appear as if they were designed to enable his opponent to minimize its effect. They are intended to protect the jurymen against hearing anything that may weigh so heavily with them that they will forget matters of greater significance. The twelve triers are so sensitive, it appears, that they cannot be trusted to discriminate between what is worth weighing and what is not. There are many of these rules and they have many exceptions. At one time a violation of any one of them meant certain reversal. Lawyers came to pay a great deal of attention to them and improved them, for they meant "time out" when a witness was scoring or threatening to score too heavily, and perhaps complete relief in the event that the verdict was unfavorable.

This development has been so great that these rules can now be properly presented and discussed only in four, five or six ponderous volumes. Their importance has begun to wane, but there is still entirely too much of this kind of law. Only this much may be ventured here: there would be no law of evidence in the present sense of the term if it were not for the jury. No other method of

investigation could use such rules and survive. As trial by jury offers the lawyer his stage, the rules of evidence are but a part of the technique through which he speaks his lines, a technique so perfected as to give the leading rôle the emphasis and freedom which the drama requires

After the witnesses have all been heard, the judge is called upon to instruct the jury in the rules of law which govern the case. This translation of a case to the jury is the most difficult and most fatal step in procedure. More cases are reversed for errors in instructions to juries than for any other cause, and this despite numerous devices to make errors here unavailable for reversal. Today the process is largely ritualistic; nevertheless the judge spends hours preparing his charge, and maybe other hours delivering it. The aim of the charge is to control the jury's judgment on the questions which they are supposed to decide without seeming to invade their province. Much of the law's theology has crystallized at this point, and the judge who does not respect the fine shadings of that theology finds himself reversed. It is the least understood of all the procedural devices, both by laymen and lawyers, and at the same time it is the least useful.

In a recent rape case the judge mistakenly gave the defendant the benefit of the defences of self-defence, adequate provocation, assault with a deadly weapon, and sudden passion! Nevertheless the defendant was convicted. [Johnson v. State, 99 Tex. Cr. R. 25, 267 S. W. 713.] Only in those States in which the judge still has the common law power to comment upon the weight of evidence and advise with the jury is there any real place for this

function. Yet the United States Senate has only recently passed the Caraway bill designed to deprive Federal judges of the power to advise and instruct juries. Thus, in the face of the most urgent appeals from all quarters for a better administration of the law, our highest legislative body would take away the power which has given trial by jury its chief, if not its only, dependability!

Closely associated with the charge of the court is the argument of counsel—one to six hours to the side, depending upon the importance of the case. Cases are won and lost at this stage. Counsel may overcome handicaps of prior errors, handicaps of poor witnesses, handicaps of every sort if he has skill in jury argument. Likewise counsel may lose the advantage of good generalship, the advantage of good witnesses, the advantages of a just cause, if he lack skill at this point. No one knows what the factors are that enter into a jury's conclusions. No one can guess what a particular jury will do. The least that can be said is that trial by jury is a process of strategy, of matching wits, a battle of surprises and emotional struggles at best, and that in this sort of combat the point of merit is apt to be lost.

The closing scene of the trial is played behind the curtain. The jury's consideration of the case is not a matter for disclosure, except by someone listening at the keyhole or peeping over the transom or hidden in the closet. The juror may not impeach his own verdict. We may not hear him confess his own villainy. And well we may not, for in those few jurisdictions in which inquiry into the jury's deliberations is now allowed, it is found that

there is seldom a case in which its members do not consider matters prohibited by their oaths—matters that give ground for a new trial. Such, for instance, as the defendant's being insured, or the wealth or poverty of the litigants, or the size of the attorney's fees, or facts that some juror knows about the case or about one of the parties or some witness. Beside, there are verdicts arrived at by the toss of a coin, the turn of a card, or other chance, or by some chicanery used by some of the jurors to get agreement by the others. (Consider, here, the first Knapp trial.) These twelve men once in the juryroom, are real peers. And their verdict is the judgment of the country. It may settle the case. But more and more frequently it is merely the first round of a prolonged bout.

But a moment is required to contrast this ponderous process with trial before a judge, or a board of arbitration. If the jury is taken out of the courthouse, the drama is gone. The court-room is not the same place. There is no tenseness. The lawyers are not the same; they no longer glare at one another. Even the parties are docile. The judge returns to himself. The attendants drop back into their humdrum ways. The crowd is made up of a few parties at interest and the habitual loungers. The place is dead. There is no haranguing in choosing the arbiter, nothing more than a brief statement of the issues, and seldom that; the examination of the witnesses proceeds with calmness, barring the most exceptional case; objections to evidence are seldom made, and when made, if there is the slightest uncertainty, the judge hears the evidence and

states that if it appears to be inadmissible he will ignore it in his findings.

The argument on the issues is brief and pointed. There are no instructions to prepare, no verdict, no motion for a new trial except in the rarest instance. The judge either announces his conclusion, or else takes it under advisement for further study and later announcement. He may then file the findings which support his decision. The whole process is deflated until there is little left to do save get down to business. The trial of the same case before a judge and before the same judge with a jury, with the same lawyers, reflects the most startling differences; but the differences are those of time and technique and errors. Judge and jury are generally in accord if the jury is not brought under some improper influence. If they disagree, it frequently results from some error or mistake which necessitates a new trial. The differences come in those close cases in which there can be no certain opinion, and in which two juries or two judges would as likely as not reach opposite conclusions.

Time is the most dependable of defences. It can be used both by meritorious and unmeritorious litigants. If a meritorious litigant does not ask for jury trial, his opponent usually does, and probably thereby secures his most effective defensive weapon. He can afford to wait and prefers to do so. His success depends upon adventitious factors. Anything may happen. Witnesses may scatter, death may intervene, the memories of claimants and witnesses may grow dim, opponents may lose interest, counsel may become absorbed in more promising litigation, the

feeling of injury and injustice may subside. There are a thousand possibilities.

Time has enabled many unmerited claims to become the basis for dangerous suits, and has in turn destroyed as many more of merit. To the same degree that it helps the one, it harms the other. The fraudulent claimant understands this and it is his insurance of the compromises on which he fattens. Defendants who buy their peace are his victims. It is good business, therefore, to keep the jury docket crowded; the more boldly he can make his claims, the more vicious his enterprises for employing the agencies of justice against herself. The recent disclosure of a New York City investigation of more than 600 pending negligence cases brought by one firm indicates the proportions this business may reach.

But aside from all the handicaps that flow from mere delay, and from the prostitution of procedural devices, the chances for reversible error due to the treacherous steps of the extended process of jury trial are so great that no counsel for the defence can overlook the favorable hazards. This is contrary to the prevailing impression that the jury is the plaintiff's or poor man's friend. No doubt the individual juror is very favorable to the injured person, but despite that fact all available data show that defendants demand more juries than plaintiffs, and this is true even though a plaintiff normally exercises the first choice, thus relieving the defendant from making any choice at all.

The reason is clear. At every turn a defendant may legitimately lie in ambush if he so desires, and most de-

fendants do. The very favorable attitude of jurors for plaintiffs is justification enough for claiming all the protection the offsetting advantages afford. But there is in fact little basis to warrant the belief that jurors are more favorable to claimants than are judges. In a recent survey of 8800 Connecticut cases disposed of by the Superior Courts in 1925 and 1926, it was found that of the cases disposed of by jury trial plaintiffs were given judgment in only 50%, whereas in cases tried without juries plaintiffs received judgment in 75%. Approximately the same ratio held in negligence and contract cases, the two most important classes of jury litigation. In *bona fide* cases, judges seem to have more sympathy for a plaintiff's claim than juries. I have heard defence counsel frequently express the opinion that to a *bona fide* claimant the judge will be more intelligently liberal than a jury, and this, plus the fact that a judge can protect his conclusions better than a jury, accounts for the defendants claiming jury trial.

How much business is disposed of by trial by jury? How much business can it be made to care for? How well are its peculiar guarantees executed? Trial by jury is not a matter of right in equity cases except in two or three States. Equity cases are numerous, and usually are both important and complex. They are heard either by the chancellor in the first instance, or by a master under the supervision of the chancellor. The procedure may be fashioned to meet the exigencies of the particular case. There are also many cases between employer and employé, once the typical damage suit, which are now handled

by industrial accident boards. Jury trial could not handle them satisfactorily, either to the parties or to society. Then there are thousands of small cases, violations of traffic laws, liquor laws, health laws and other police regulations, also small-debt cases of all sorts, which could not be cared for at all if juries were required to dispose of even a small part of them. Something substantially automatic is required for them. There are a great many more cases in which there are pleas of guilty, confession of judgments in one form or another, and uncontested cases in which there is no need for a jury. Finally, there are very many cases in which the parties waive a jury. In Connecticut and Maryland a very large percentage of major cases, including many serious felonies, are tried by the judge without a jury.

But aside from all these cases, what is the situation with *jury cases alone*? How much of normal jury business is disposed of by jury trials? A report of the Special Calendar Committee appointed by the Appellate Division of the Supreme Court of New York, First Department, made June 20, 1927, gives about as good an answer to this question as can be found. The report in part says:

"A brief reference to the business pending in the three courts just before the January [1927] call will make this clear. There were pending in the Supreme Court of New York county 29,466 cases triable for jury; and a case could not ordinarily be reached for trial for 22 months after it was at issue. There were pending in the Supreme Court for Bronx county 9,562 cases triable by jury; and

a case could not be reached for trial for 24 months after it was at issue. There were pending in the City Court of New York county about 18,000 cases triable by jury, the delay in reaching a case for trial being 16 months. At the same time there were pending in the Municipal Courts 59,086 cases triable by jury, and a case could not be reached for trial in crowded districts for a year and a half.

And further:

"*It is a significant circumstance that a large proportion of cases placed on the calendar are not disposed of by inquest or jury trial.* Taking the year 1924, for example, as showing the recent trend, it appears that in that year out of 15,923 cases disposed of, 12,147 or over 76% were disposed of without trial, by discontinuance, abatement, reference or otherwise. In the years 1919 to 1923, inclusive, the cases disposed of without a jury trial varied between 70 and 75%, except in 1923, when it rose to 80% of the cases which disappeared from the calendar. The presence of these cases on the general calendar undoubtedly caused uncertainty and delay in reaching those of later issues which were awaiting an opportunity for trial."

Taking the country over, this is not far from a representative picture of the conditions of the dockets. Twenty to thirty per cent of jury cases actually tried! This is our constitutional guarantee of the right to trial by jury in performance.

Even more startling is the fact disclosed by a recent statement of Edwin C. Coe, calendar clerk of the Supreme

Court of New York county, that the number of new cases added to the calendar in the Supreme Court for New York county for the ten months period ending March 1, 1928, decreased by 11,092, or 72%, as compared with a like period immediately before legislation went into effect increasing the calendar fee from $3 to $20. Under another recent statute, requiring an affirmative demand for a jury trial and a fee of $12 therefor, jury trial was affirmatively waived in almost one-third of the cases when filed, and doubtless there will be further waivers before the cases are tried.

The recent survey made by the Yale Law School covering approximately 8800 civil cases disposed of by the Superior Courts of Connecticut during 1925 and 1926 disclosed:

(1) That juries were had in only 38% of the cases tried in which juries might have been had;

(2) That approximately only 13% (232 in number) of all the cases tried (excluding uncontested divorces, uncontested foreclosures and suits for change of name) were tried by juries.

No doubt these two facts account in very large part for the comparatively uncongested condition of the dockets of these courts.

The figures are remarkable in that they disclose that jury trial is little more than a bad habit, and yet one that serves to clog our courts so that only a fraction of the jury business can actually be done by juries. It is significant that we hear little complaint about delays in non-jury cases,

despite the fact that there is small time for them, since the time of the courts is taken up very largely by jury cases. It is a safe conclusion that were it not for trial by jury, our present judges could clear their dockets and dispose of all the new business as it came to them, and that the number of judges could be reduced. Clearly it would be impossible to enlarge the judiciary sufficiently, or furnish enough court-room facilities, jurors, attendants, sheriffs and the like, to give prompt attention to all the jury cases docketed without disrupting the general business of the community. Our court machinery is already extravagantly large, so much so that it uses up much of its energy in the mere operation of the machine.

Moreover, the satisfactory disposal of the cases still tried by juries is not at all certain. More jury verdicts than judge verdicts are appealed and more are reversed. Trial by jury not merely clogs the trial court, but furnishes a large part of the business of the appellate courts. In the recent survey of Connecticut cases there were new trials, disagreements and withdrawals in 15% of the cases tried by juries against none in cases tried before judges; this, although the judges tried more than seven times as many cases (excluding divorce and other formal cases) as did juries. Moreover, approximately 26% of the jury cases were appealed, whereas only 8% of the cases tried without juries were appealed. The story is the same everywhere. The record of business done by juries is not merely not encouraging; it alone is enough to condemn trial by jury as a method of attending to the serious business of litiga-

tion. There is no promise that it can do better. It has neither the speed nor the precision required.

What of the cost? Little need be said here. Anything that prevents the machinery of justice from functioning properly is expensive—more so than we can calculate. Assuming honest and most effective administration, the time consumed in jury trials, as shown by the Connecticut survey, is more than twice that required in trials by judges. The difference in time in getting to trial is even greater. The cost of obtaining a jury and keeping it until a verdict is reached, the time of the judge and court attendants, the additional time of the parties, lawyers, and witnesses, the greater facilities offered by trial before a judge in allowing adjournments and accommodations to parties and witnesses, the reduction in appellate reviews incident to the more informal court trial, all make the cost of jury trial anywhere from three to eight times that of any other mode of trial now employed.

This in calculable terms of money; it stands aside from the cost in terms of satisfactory justice. But whether we figure the cost of trial by jury in terms of time consumed, money expended, the quality or quantity of justice afforded, the waste of effort, the abuse of judicial process, or the loss in respect for the administration of law, we discover a deficit far greater than any imaginable satisfactions can overcome. The extra cost of jury trial in the United States is enough to cover the whole outlay required by the judicial branch of government, State and Federal. But it is said that citizens are educated by the institution, and are thus brought to have confidence in their government! I

wonder if there is even a glimmer of truth here? And if so, what notions of government do they get?

What is the case in behalf of jury trial? There is none, save such as lies in the reverence we may have for a venerable institution.[2] There are some few cases, as for instance, foolish political prosecutions, and witch-burners persecutions, in which the jury may save the law's face. But after all, it is usually the backbone of some fearless judge that does the saving in such cases, if there is any saving at all. We have enshrined jury trial along with other antiquated ideas about the administration of justice in our fundamental law, and worse still, in the hearts of our people. They lie there as dead as Hector, and everybody knows they are dead, but who dares touch them? Why make one's self foolish? Those "true friends of the people" who traffic in trial by jury would want nothing better. "Oh, yes, just as we thought, those corporation lawyers and highbrows, those foes of justice, are finally showing themselves in their true garb! They propose to rob the poor man of his one chance of justice, his security against tyranny, the people's jury! They would destroy this jewel of Magna Charta!" Thus they capitalize the tendency in all people to worship the phrases as well as the practices and memories of their ancestors. What can be done against this cry? Nothing.

Few institutions have struck their roots so deeply into the social order for so long a time and persisted through

[2] This view has been somewhat modified as appears in chapter 14, Jury Trial and The Appellate Courts.

so eruptive a period as trial by jury. Its inception was one of the harbingers of the democratic era. It marks one of the first definite breaks between divine and secular dispensation—religion versus the ballot. It has endured the full period of democracy's ascendency and has been in the vanguard wheresoever democracy has gone pioneering. But as religion at last gave over a large part of the world's affairs to the voter, the voter in turn is now called upon to give over a large part of those affairs to the scientist. This call will be answered as stubbornly and as grudgingly as was the former.

After all, religion has only become reconciled to sharing her powers with democracy when democracy has in turn shared her votes with religion. So religion finds no pleasure in seeing the voter hand over an increasing authority to this interloper called science. Religion *en masse* is afraid of the scientist; so is democracy *en masse*. The scientist wants too much; he claims too much; he is too self-sufficient; he has no deference for his elders. And he is just as stubborn and far more unmannerly than either the churchman or the politician. He is still young. Moreover, science means technique, patience, disappointment, awareness, understanding, and all these are painful. They are often, indeed, beyond the range of men, whereas religion is always near and soothing, and voting is easy and intoxicating.

To which shall be allocated the administration of justice? Religion surrendered that function slowly and painfully. Only a few vestiges of her ritual remain today: oaths, the third degree, ministering to the condemned.

Democracy's victory is complete. The shadow of the ballot is always apparent: the public prosecutor, the grand jury, the trial jury, and too often the judge himself. But can the mere voter do the job longer, or must he stand by for one who knows more about it—more about the true interests of society, more about the determination of facts, more about the prevention of crime, more about handling the complex business of men?

It is hard to visualize the structure of English society during the Twelfth, Thirteenth and Fourteenth Centuries —the formative period of the jury. The important interests of those days were primarily those relating to the possession of the surface of land, those protecting the person against such violent harms as murders, robberies, assaults and batteries, those pertaining to chattels such as cattle, and those relating to the domestic relations, which were largely cared for by the church. It was to settle simple disputes that the jury had its early service. As the interests—the wants and desires—of people have multiplied a thousand fold and more since that day, so the legal protection granted to such interests has multiplied both in quality and detail. The remedies of those early centuries were few and simple, but drastic and fatal. Their science was crude. The ordeal, compurgation, and trial by battle were just fading out. Death and outlawry were prescribed for crimes; imprisonment and the ruthless seizure of property for crimes and civil wrongs as well. The jury could well understand these blunt methods. The jury also furnished a safeguard against a too tyrannical use of these bludgeons of the law.

The same factors which have repeatedly changed the fabric of the social order have likewise altered the texture of legal thought. Change in one brings change in the other. We are constantly enlarging and remodelling the classification of rights, duties, powers, privileges and immunities in keeping with the general social and economic development. We deal fewer death blows; we take more pains. Even in crime the quickening of a rationalism is felt. In the courthouses alone the medieval complexion of our law has changed least. Here it was most ritualistic, and as formalism is always dearest to men, here it is the last to change. But even here there have been tremendous changes. Few wigs remain; the old spencerian flourishes have gone. The most persistent of all the institutions surviving is the jury.

The litigation of the earlier centuries, as I have said, involved simple issues, simply fought out under relatively simple theories of law, and the fight was in the open and the methods of counsel were obvious. All this has changed. Elaborately trained counsel now have at their command the zeal of the publicist, and the machinery of the press, supported by the skill and daring of the sleuth, and the laboratories of the chemist, physicist, engineer, psychologist, psychiatrist, biologist and all the other scientists. It is no longer only the hypothetical question that gives the courtroom its odor of science. It is no longer merely the ingenuity of one smart lawyer at work; a staff of specialists is at his command.

Clients are demanding and receiving all the aid the scientific world can give their cases. Time and money pile

up enormously. The data not infrequently assume aspects as far above the understanding of the every-day citizen as modern science is beyond the science of the Fourteenth Century. Under these conditions, honesty and ability to read and write are no longer enough to meet the demands of a modern law-suit. The average jury in any case of difficulty is about as helpful as it would be in solving a problem in the higher mathematics, in industrial finance, or in electrical engineering.

As a formula for administering justice trial by jury is merely a societal antique. But it typifies something back in the growth of society which has been gripped by man's emotions and they will not let it go. Its processes radiate a flavor of popular justice and a flourish of democracy. Those are still stout words. But the fact is that in the organism of society, as in the organisms of all life, there are structural parts which no longer serve useful functions. They reappear nevertheless in succeeding generations. They are sometimes removed from the physical organism by heroic surgery. To this the social organism seldom submits. Moreover, the intelligence that would do so in this instance would not stop with the jury's removal; it would demand more cutting.

But the social body as well as the physical one can isolate a useless part. In a thousand ways already and in others to come the social body is building the jury out of its anatomy. The jury's impotency is widely acknowledged. Informal bodies, courts with special jurisdictions, trial by judges, insurance, arbitration and other devices have already taken over some of its most important func-

tions. Yet much remains to be done before the irritation can subside. The cost and the waste are without calculation. But life seldom counts costs; and neither does the law.[3]

[3] See the following articles for full discussion, Wigmore, A Program for the Trial of Jury Trials, 12 Am. Jud. Society Journal 166 (April, 1929); John W. Staton, The Special Verdict as an Aid to the Jury in Civil Cases, 34 Md. State Bar Ass'n Reports 4 (1929), 13 Am. Jud. Soc. Journal 176 (1930), in both of which articles numerous citations are given to other recent articles.

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.5202 9479, 6/28/02

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JUL 9 2002